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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-88

In re Applications of

EZ COMMUNICATIONS, INC. File No. BRH-910401C2

For Renewal of License of FM Radio Station WBZZ(FM) on Channel 229B at Pittsburgh, Pennsylvania

ALLEGHENY COMMUNICATIONS GROUP, INC. File No. BPH-910628MC

For a Construction Permit for a New FM Broadcast Station on Channel 229B at Pittsburgh, Pennsylvania

HEARING DESIGNATION ORDER

Adopted: March 26, 1993; Released: April 5, 1993

By the Chief, Audio Services Division, Mass Media Bureau:

1. The Commission, by the Chief, Audio Services Division, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration: (a) the application of EZ Communications, Inc. (EZ) for renewal of license of station WBZZ(FM), Pittsburgh, Pennsylvania; (b) the application of Allegheny Communications Group, Inc. (Allegheny) for a construction permit for a new FM station on Channel 229B at Pittsburgh, Pennsylvania; (c) a Petition to Deny the WBZZ(FM) license renewal application, filed June 28, 1991, by Allegheny; (d) an Opposition to Petition to Deny filed on July 29, 1991, by EZ; (e) a Reply to Opposition to Petition to Deny filed on August 19, 1992, by Allegheny; (f) a Petition to Dismiss or Deny filed on December 6, 1991, by EZ; (g) an Opposition to Petition to Dismiss or Deny filed on December 19, 1991, by Allegheny; (h) a Reply to Opposition to Petition to Dismiss or Deny filed by EZ on January 17, 1992; and (i) a Motion for Leave to Respond to Reply to Opposition to Petition to Deny filed on February 7, 1992, by Allegheny.

Allegheny's Petition to Deny

2. On June 28 1991, Allegheny filed a petition to deny EZ's renewal application for Station WBZZ(FM). Allegheny requests the specification of five issues relating to EZ's qualifications to be a Commission licensee. The five issues are all based on matters which were the subject of an arbitration proceeding and two civil suits involving WBZZ's former news director, Elizabeth Nelson Randolph.

Background

3. In the arbitration proceeding, an arbitrator sustained a grievance brought by the American Federation of Television and Radio Artists-Pittsburgh on Randolph's behalf alleging that Randolph had been wrongly discharged by EZ. The arbitrator's decision finds that from 1986 to 1988, while she was a newscaster for WBZZ, Randolph had been the subject of repeated insulting on-the-air remarks of a sexually provocative nature by two WBZZ announcers. The arbitrator determined that, after one such incident, Randolph became so distressed that she could not go on the air and left the station without completing her final news reporting segments.[1] After she left, WBZZ's general manager suspended the two announcers and instituted an investigation of the incident. When Randolph returned to work later that day, she was placed on leave of absence pending an investigation. Subsequently, based on her unauthorized failure to fulfill her on-air assignment, WBZZ terminated Randolph's employment. Ultimately, the arbitrator found that Randolph's walking off the job was reasonable, and awarded her severance benefits. An action instituted by EZ to vacate the award was denied (Civil Action 88-2636).

4. In addition to the grievance, Randolph filed a complaint against EZ and the two announcers in the Court of Common Pleas of Allegheny County. In her suit she sought damages for defamation, intentional infliction of emotional distress and invasion of privacy (Case No. GD88-02730). Randolph also filed a sex discrimination complaint with the Pennsylvania Human Relations Commission which resulted in the issuance of a right to sue letter. Randolph then commenced a second civil suit against EZ in the court of Common Pleas of Allegheny County (Case No. GD89-22010). On February 14, 1990, the jury, in case No. GD88-02730, awarded a verdict in favor of Randolph. While appeals on the jury trial were still pending, both cases (GD88-02730 and GD89-22010) were settled simultaneously by the parties. The settlement agreement provided that Randolph would not file or assist in the filing of a complaint with the FCC and that if called upon to testify concerning the subject matter of her law suits she will not on the ground that she is prohibited from doing so by court order.[2] By Order dated July 1, 1991, the judge in case No. GD88-02730, ordered the record sealed.[3]

News Distortion Issue

5. Based on the above record, Allegheny requests that a news distortion issue be specified against EZ. Allegheny contends that EZ's on-the-air report that Randolph, a "public figure," had engaged in sexual impropriety, constituted news. In its Opposition to Petition to Deny, EZ

[1] In this incident, an announcer from a station affiliated with WBZZ called in a "joke" about Randolph, which the arbitrator found "alludes to the performance of oral sex."

[2] By letter dated April 27, 1989, Randolph filed a complaint with the FCC's EEO Branch alleging sex discrimination. On June 20, 1991, she requested withdrawal of her letter.

[3] Before the record was ordered sealed, Counsel for Allegheny, on June 7, 1991, reviewed it and obtained information which Allegheny submits in support of its petition to deny.

points out that there is no evidence that the allegedly offensive remarks were made during newscasts or were ever intended to constitute news.

6. In *Hunger in America*, 20 FCC 2d 143, 151 (1969), the Commission found that "[r]igging or slanting the news is a most heinous act against the public interest...." Here, however, there is no evidence that the statements concerning Randolph were made in the context of a news broadcast or were intended to constitute news. Moreover, given the entertainment context of the statements, we do not believe that the listening public would construe the statement as news. Consequently, we will decline to add a news distortion issue.

Indecency Issue

7. Allegheny relies on a determination by the arbitrator that the nature of the material broadcast was "lewd, offensive, sophomoric, in bad taste and beyond anything that an employee should be subjected to - even if they are part of an 'entertainment vehicle.'" to argue for the specification of an issue to determine whether WBZZ broadcast indecent material in violation of 18 U.S.C. Section 1464. Allegheny notes that the material was broadcast in the morning, a time period when children may be in the audience. *Citing, Great American TV and Radio Co., Inc.*, 66 RR 2d 1557 (Mass Media Bur. 1989). Allegheny also cites the court's holding in *Monroe Communications Corporation v. FCC*, 900 F.2d 351 (D.C. Cir. 1990) rejecting a Commission ruling that excluded the consideration of obscenity broadcasts in the renewal context.

8. The Commission has defined broadcast indecency as language or material that, in context, depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Indecent programming contains sexual or excretory references that do not rise to the level of obscenity. As such, indecent material is protected by the First Amendment and cannot be banned entirely. It may, however, be restricted in order to avoid its broadcast during times of day when there is a reasonable risk that children may be in the audience. Consistent with existing court decisions in this area, the Commission currently prohibits the airing of indecent material between 6:00 a.m. and 8:00 p.m.[4] *See Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). The Commission will act on all documented complaints of indecent or obscene broadcasting that it receives. Given the sensitive nature of the cases, it is important that the Commission be provided as full a record as possible to evaluate allegations of obscene or indecent programming. Consequently, the Commission requires (1) a tape, transcript, or significant excerpts of the program; (2) the date and time of the broadcast; and (3) the call sign of the station involved.

9. We note that in the instant case, the Federal Communications Commission has received no complaints alleging the broadcast of indecent matter by WBZZ. Moreover, we note that neither the court nor the arbitrator reached a determination that the material broadcast by WBZZ was either obscene or indecent. The arbitrator and the court determinations were directed to the impact of the broadcasts on an employee of the station and not to whether the matter broadcast was obscene or indecent.[5] Moreover, Allegheny has not provided a tape, transcript or significant portion of the broadcast in question which would permit the Commission to make an independent determination that the broadcast matter was either obscene or indecent. Absent this documentation we are left to speculate as to the exact nature and context of the broadcast matter which distressed Randolph. As a final matter, even if we were to find that the "joke" itself was indecent, we would be disinclined to designate an issue against EZ based on an isolated incident which apparently was never repeated. This is especially so in light of the evidence that upon learning of the "joke," management took immediate action by suspending the announcers responsible and investigating the incident. Under these circumstances we will not specify an indecency issue.

Discrimination Issue

10. Allegheny also seeks an issue to determine whether EZ violated Section 73.2080(a) of the rules which provides that "no person shall be discriminated against in employment by such stations because of... sex." Allegheny contends that by subjecting Randolph to sexually oriented "banter," Randolph was compelled to assume the role of a stereotypical "bimbo" as a condition of her employment. In its Opposition, EZ points out that Randolph was paid to participate in an entertainment program and that her suit, based on remarks by her co-performers which were intended to be comedic, was a highly unusual claim for which there is little or no precedent. Finally, EZ notes that there is no basis for the requested issue because there has been no allegation that WBZZ's female and minority employment record was deficient.

11. A sex discrimination issue will not be specified. Section 73.2080 is designed to prevent discrimination by licensees on the basis of race, color, religion, national origin or sex in the recruiting, hiring and promoting of employees. Allegheny has not demonstrated any discrimination in recruiting, hiring or promoting of employees by EZ. Moreover, the matter on which Allegheny relies has been the subject of two lawsuits by Randolph. These law suits have been settled while appeals were still pending. Under this circumstance, we are disinclined to specify an issue. *See, Policy Regarding Character Qualifications in Broadcast Licensing (Policy Statement)*, 102 FCC 2d 1179, n.63 (1986), *recon. granted in part, denied in part*, 1 FCC

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[4] In its *Report and Order*, FCC 93-42, released January 22, 1993, the Commission adopted a rule to implement a Congressional mandate to prohibit the broadcast of indecent programming (a) between 6:00 a.m. and 10:00 p.m. by any public broadcast station that goes off the air at or before 12 midnight; and (b) between 6:00 a.m. and 12 midnight for any other radio station. The new hours were to become effective February 25, 1993. However, the D.C. Circuit Court of Appeals has stayed the effectiveness of the rule. *See Action for Children's Television v. FCC*, Case No. 93-1092, *Order* filed February 23, 1993.

[5] In this regard we note that the arbitrator found that "The jokes and suggestive remarks that were directed to her [Randolph] were lewd, offensive, sophomoric, in bad taste and beyond anything that an employee should have to be subjected to--even if they are part of an entertainment vehicle." *Award of Arbitrator*, (Case No. 55-300-0064-88) dated November 16, 1988, at page 12.

Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir June 11, 1987).

Civil Misrepresentation Issue

12. Allegheny contends that the Commission has recognized that "civil misrepresentations not involving governmental units may be relevant to a broadcaster's character qualifications." *Policy Statement, recon. granted in part*, 6 FCC Rcd 3448 (1991). Here, Allegheny contends, EZ broadcast a civil misrepresentation concerning Randolph to the general public. Consequently, Allegheny contends, an issue is warranted to determine the impact on EZ's character qualifications of the decision of the arbitrator and the adjudication in Case No. GD88-02730.

13. A civil misrepresentation issue will not be specified. In the Commission's *Policy Statement*, the Commission, after recognizing that "*some* civil misrepresentations ... may be relevant to a broadcaster's qualifications," stated that, "[n]evertheless, based on our experience, we believe that the category of civil misrepresentation is too broad to be presumptively relevant to a broadcaster's qualifications." (emphasis supplied) *Id.* The Commission also stated that it may consider such matters on a case-by-case basis. *Id.* In the instant case, where the litigation has ended in a settlement to the apparent satisfaction of the parties, further investigation of this matter is not warranted.[6]

Abuse of Process Issue

14. Finally, Allegheny contends that addition of an abuse of process issue is warranted because the settlement EZ entered into with Randolph was designed to obstruct inquiry by the Commission. In this regard, Allegheny notes, Randolph is obligated, under threat of contempt, to refuse to honor any subpoena that might be issued by the Commission and the record in the litigation has been sealed. Allegheny points out that the settlement followed soon after the release of the Commission's reconsideration of its *Policy Statement*. According to Allegheny, the reconsideration created uncertainty as to whether the Commission would view the defamation action as a relevant FCC matter. Thus, Allegheny concludes, the settlement was an effort to preclude FCC scrutiny. It is well settled, Allegheny states, that it is an abuse of process for a party to attempt to induce, entice, coerce or otherwise improperly influence a witness or prospective witness in a Commission proceeding. *Citing, Chronicle Broadcasting Co.*, 19 FCC 2d 240, *rev. denied*, 23 FCC 2d 162 (1970); *Harvit Broadcasting Corp.*, 35 FCC 2d 94 (Rev. Bd. 1972) and *Kaye Smith Enterprises*, 98 FCC 2d 675 (Rev. Bd. 1984). Finally, Allegheny contends that the settlement interferes with Allegheny's right to obtain information for its petition to deny EZ's pending renewal application and may be violative of Section 73.3589 of our rules which restricts payments in exchange for refraining from filing a petition to deny or informal objection.

15. An abuse of process issue will not be specified. Section 73.3589 prohibits "payments in exchange for withdrawing a threat to file or refraining from filing a petition to deny or informal objection." Here there is no evidence that Randolph threatened to file a petition to deny or informal objection. Nor is there evidence that the payment to Randolph was in exchange for her agreeing not to file a petition to deny or informal objection. Moreover, while Allegheny is correct in its contention that an attempt to improperly influence a person with information would constitute an abuse of process, none of the cases cited by Allegheny support the conclusion that entering into an agreement to settle a civil suit, constitutes such an improper influence. Allegheny's contention that the settlement agreement infringes on its right to obtain the information it needs to successfully challenge EZ's license renewal is also without merit. Allegheny has the right to gather all the information concerning EZ that it can, consistent with the law. This it apparently has done. We fail to see how the settlement agreement has violated any of Allegheny's rights.

EZ's Petition to Dismiss or Deny

16. On December 6, 1991, EZ filed a petition to dismiss or deny Allegheny's application. In its petition, EZ claims that Allegheny's application is technically deficient and must be dismissed because it fails to provide protection to WQIO(FM), Mt. Vernon, Ohio, as required by Section 73.215 of the Commission's Rules. In its reply to Allegheny's opposition to its petition to dismiss or deny, EZ further argues that Allegheny's application should also be dismissed because it fails to protect a proposal to substitute Channel 228A for unoccupied Channel 223A at Barnesboro, Pennsylvania (MM Docket No. 87-433).[7] EZ contends that because the Commission, in its *First Report and Order*, 4 FCC Rcd 4780 (1989), abolished the *Cameron* Policy which permitted challengers to specify an incumbent licensee's antenna site and technical facilities, challengers are no longer eligible for Section 73.213 processing.[8] In its opposition, Allegheny notes that EZ's facilities are already short-spaced to WQIO by 36.2 km and that a grant of its application would reduce the short-spacing by 1.9 km. With regard to the Barnesboro proposal, Allegheny contends that it is only a proposed allocation and, as such, is not entitled to protection. Further, Allegheny argues that to deny Section 73.213 processing to renewal challengers would impermissibly impose disparate requirements on them that would create a pro-incumbent bias in comparative hearings. *Citing, Las Vegas Broadcasting Co. v. FCC*, 589 F.2d 594, 600 (D.C. Cir. 1978), wherein the court

[6] We also note that "misrepresentations" reported in the arbitrator's decision and the court case were all made in the context of comedic skits which were broadcast as part of WBZZ's entertainment programming. We are disinclined to find that comments intended to be humorous, and which were broadcast with no intent to deceive the public constitute a "civil misrepresentation." *See Fox River Broadcasting*, 93 FCC 2d 127, 129 (1983), where the Commission held that misrepresentation necessarily includes an intent to deceive.

[7] In an *Order to Show Cause*, 4 FCC Rcd 6939 (1989), the Commission, by the Chief, Allocations Branch, changed the Barnesboro allocation to accommodate other modifications of the Table of Allotments.

[8] Section 73.213(a) provides that, with respect to grandfathered short-spaced stations (stations on which the short-spacing existed as of November 16, 1964), a transmitter site or technical proposal may be modified so long as the proposed 1 mV/m contour "is not extended towards the 1 mV/m contour of any short-spaced station."

faulted the Commission for imposing an unreasonably strict financial qualifications standard on a renewal challenger.

17. We will not dismiss Allegheny's application as technically deficient. Here, Allegheny is seeking the license currently controlled by EZ. Our engineering study shows that the contours of EZ's existing station extend further in the direction of WQIO than do the contours of Allegheny's proposed station. Consequently, a grant of Allegheny's application would not result in an increase in radiation toward WQIO. Where a grant would not increase cognizable interference above and beyond that presently caused by the existing licensee the Commission will not dismiss or deny the challenger's application. *See, Royce International Broadcasting*, 2 FCC Rcd 1368 (1987). Moreover, while the Commission did eliminate the *Cameron* presumption in 1989, that presumption only related to the availability to a challenger of an incumbent licensee's facilities. By eliminating the presumption, however, the Commission did not change the challenger's right to have its application processed under the same standards as the incumbent's. In *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Stations Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5364 (1991), the Commission specifically stated that it would permit existing short-spaced licensees to relocate to another similarly short-spaced site, provided the current overlap is not increased. We agree with Allegheny that, under these circumstances, to preclude the processing of its application pursuant to Section 73.213 would create an impermissible bias in favor of the incumbent licensee. *See Las Vegas Broadcasting Co., supra.* Allegheny's application, however, is short-spaced to the Barnesboro rule-making proposal. Here, Allegheny has requested Section 73.215 processing with regard to the Barnesboro proposal. Allegheny's Section 73.215 showing, however, did not include a request for waiver of the note to subpart (e) of Section 73.215 which states that the Commission will not accept applications that specify short-spaced antenna locations pursuant to this section where the proposed distance separtion is less than the normally required distance separations in Section 73.207 by more than 8 km. Consequently, Allegheny is not in compliance with Section 73.215 with regard to the Barnesboro proposal. While Allegheny need not protect the Barnesboro proposal, FCC policy requires that, should that proposal be adopted, Allegheny would have to protect the allotment. Therefore, any subsequent grant of Allegheny's application shall be made contingent on the outcome of MM Docket No. 87-433. *See, Steve P. Neville and Judy Crabtree*, 3 FCC Rcd 148 (Chief, Audio Services Division, 1988).

18. We note, however, that Allegheny is short-spaced to an allotment on Channel 229A at North Madison, Ohio. The *Report and Order*, 7 FCC Rcd 7163 (1992), for this allocation was released on November 5, 1992, and became effective December 21, 1992. Once the allotment became effective, Allegheny was required to eliminate the short-spacing.[9] Because the Allegheny application was filed before the release of the *Report and Order*, Allegheny will be given thirty days from the release of this Order in which to amend its application to eliminate the conflict with the North Madison, Ohio, allotment.

19. EZ further contends that Allegheny' application should be dismissed because it violates Section 73.316(b)(2) of our rules which prohibits the authorization of directional antennas that have a radiation pattern which varies more than 2 dB per 10 degrees of azimuth. Allegheny, however, on August 30, 1991, timely amended, *inter alia*, the engineering portion of its application to modify its directional antenna proposal. EZ, utilizing the relative field tabulations for Allegheny's new proposal, argues that Allegheny's application, as amended, is still in violation of Section 73.316(b)(2) of our rules. Finally, EZ contends, Allegheny failed to state that its antenna will be mounted "in accordance with specific instructions provided by the manufacturer," and that "no other antennas of any type are mounted on the same tower level as a directional antenna, and that no antenna of any type is mounted within any horizontal or vertical distance specified by the antenna manufacturer as being necessary for proper directional operation," as required by Sections 73.316(c)(5) and (c)(7) or our rules, respectively. In response, Allegheny contends that the Mass Media Bureau does not require the statements to be explicitly made in construction permit applications and that, in any case, the failure to include the statements would not warrant dismissal of its application.

20. Allegheny's application will not be dismissed for a violation of Section 73.316(b). Based on the relative field tabulations provided in its amendment, Allegheny's application would violate the 2 dB per 10 degree rule. However, this is not the case when compliance with the rule is calculated based on the more accurate ERP data also contained in the amendment.[10] We will, however, require Allegheny to amend its application to provide the statements required by current Sections 73.316(c)(5) and (7) of our rules within thirty (30) days of the release of this Order.[11]

21. EZ further contends that Allegheny failed to notify the Federal Aviation Administration (FAA) of its proposed tower construction even though Allegheny proposes an increase in power over that of the existing WBZZ facility and is within 20 nautical miles of Greater Pittsburgh International Airport. EZ contends that the Allegheny proposal, when combined with that of two other FM stations, would interfere with airport operations. Allegheny is proposing to mount its antenna on an existing tower which was cleared by the FAA (Study No. 76-EA-204-OE). Where applicants are proposing to locate on existing towers, the Commission does not require them to file for further clearance with the FAA.[12] See, Section 17.7 of the Commission's Rules which

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[9] We note that both the North Madison petition for rule making and the Allegheny application were filed prior to the effective date of *In re Matter of Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *recon. pend.*

[10] A defect will not render an application unacceptable for filing if the needed information can be derived, confidently and reliably, drawing on the application as a whole. *See, Coachella Valley Wireless Corporation*, 7 FCC Rcd 4252 (1992).

[11] FCC Form 301 does not specifically require the submission of these statements. Thus, the failure to supply them does not constitute an acceptability or tenderability defect which would require dismissal of Allegheny's application.

[12] EZ also contends that it does not appear feasible for Allegheny to locate its antenna on its proposed tower because of the location of other antennae on the tower and that, contrary to Allegheny's claim, the tower is neither FAA painted or lighted. Allegheny explains that it was informed by AT&T,

specifies those antenna structures which require FAA notification. In any case, the FAA has registered no objection to Allegheny's proposal.

22. Finally, EZ contends that Allegheny's environmental statement does not establish compliance with the American National Standards Institute (ANSI) guidelines for human exposure to RF radiation because it fails to consider the other radio transmitter facilities co-located at its proposed site. A study by the Mass Media Bureau's engineering staff shows that there are multiple contributors to radio frequency radiation at Allegheny's proposed tower site. Therefore, Allegheny is ordered to submit a certification that, before commencement of construction, an agreement will be in effect requiring all stations to reduce power or cease operations as necessary to assure worker safety with respect to radio-frequency radiation when maintenance is to be performed at the site.

23. The staff's engineering study also reveals that Allegheny's response to Question 14 of Section V-B of FCC Form 301, which seeks information concerning receiver induced intermodulation interference, is insufficient. Specifically our study reveals that there is the possibility that Allegheny's signal, when mixed with the signals of two other stations, WORD, Pittsburgh, and WMXP, New Kensington, Pennsylvania, would produce a signal which has a potential to cause receiver-induced intermodulation interference (RITOIE) on the frequency of WLER(FM), Butler, Pennsylvania. Accordingly, Allegheny is ordered to investigate this matter and submit a statement to the presiding judge within thirty days of the release of this Order, specifically accepting full responsibility for the elimination of any objectionable interference (including that caused by receiver-induced or other types of modulation) to facilities in existence, facilities authorized, and radio receivers in use prior to grant of its application.

24. In addition to its allegations concerning Allegheny's engineering proposal, EZ claims that Allegheny's application should be dismissed or denied because Allegheny has no real interest in serving the needs of the Pittsburgh area. In fact, EZ contends, Allegheny's president, Herbert E. Long, Jr., a resident of northwest Washington, D.C. has been involved in two other applicants that filed renewal challenges against existing licensees which resulted in settlements.[13] Allegheny's instant application, EZ notes, is represented by the same law firm that represented Long's other renewal challenges -- the law firm of Cohen and Berfield. EZ charges that the Allegheny application is but one more in a long series of sham applications manufactured by this law firm for the purpose of extracting settlement payments from renewal applicants. In this regard EZ cites *WWOR-TV*, 6 FCC Rcd 4350 (A.L.J. 1991), *aff'd*, 7 FCC Rcd 636 (1992), appeal pending, *sub nom. Garden State Broadcasting Limited Partnership v. FCC*, No. 92-1065, (D.C. Cir. filed February 14, 1992) wherein an Administrative Law Judge refused to approve a settlement agreement between a renewal applicant and a challenger represented by Cohen and Berfield after determining that the challenger had filed its application solely for the purpose of securing a settlement. In addition, EZ contends that Allegheny's counsel, Lewis Cohen, in investigating EZ, violated Pennsylvania law by knowingly examining and disseminating the record of a civil suit he knew to be under court ordered seal.

25. EZ's allegations do not warrant dismissal or denial of the Allegheny application. The fact that Allegheny's president was involved in two settlements does not establish that the Allegheny application was filed for an improper purpose. In this regard, we note that both settlements were in proceedings involving licenses held by RKO General, Inc. In the RKO cases, the Commission specifically encouraged the applicants to settle. *RKO General, Inc. (KHJ-TV)*, 60 RR 2d 1694 (1986); *RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 5057 (1988). Similarly, we do not believe that the fact that Allegheny's law firm has filed a number of applications challenging the renewals of existing stations warrants the conclusion that Allegheny's application was filed for an improper purpose. *See Fresno Limited Partnership*, 6 FCC Rcd 6998, n.3 (1991), wherein we found such claims irrelevant in determining an applicant's *bona fides*. Moreover, even though we have concluded that an applicant represented by the law firm of Cohen and Berfield filed its application solely for the purpose of obtaining a settlement, that does not establish that Allegheny did so. In any case, prior to the time Allegheny filed its application, we changed our rules to eliminate the possibility of a renewal challenger profiting by settlement. *First Report and Order in BC Docket No. 81-742*, 4 FCC Rcd 4780 (1989). Thus, the motivation suggested by EZ does not appear applicable to Allegheny. Finally, the propriety of counsel's review of the record in the civil suit brought by Randolph (See paragraph 4, *supra*) is a non-FCC matter which we do not take cognizance of unless it is adjudicated by an appropriate trier of fact. *Policy Statement*, 102 FCC 2d at 1204-5. Moreover, we note that it does not appear that counsel committed any impropriety because the record was not under seal at the time of his review. (See footnote 2, *supra*).

26. ACCORDINGLY IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act or 1934, as amended, the above-captioned applications are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge, at a time and place to be specified in a subsequent Order, upon the following issues:

(a) To determine which of the captioned mutually exclusive applications for authority to operate on Channel 229B at Pittsburgh, Pennsylvania, would, on a comparative basis, best serve the public interest; and

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which owns and maintains the tower, that the tower would support its antenna and that the tower was in compliance with FAA paint and lighting requirements. In any case, Allegheny states that, should its proposed tower not be properly obstruction marked, it will take action to insure that it is before effectuating its proposal. We will not designate an issue concerning Allegheny's proposed tower.

[13] Allegheny's application indicates that Long was the president, a director, and a 20.39 percent owner of Potomac Broadcasting Corporation, an applicant that filed renewal challenges against WGMS(AM), Bethesda, Maryland, and WGMS-FM, Washington, D.C., both of which were owned by RKO General, Inc. Allegheny's application also indicates that Long was a partner in LBW Partnership, a limited partnership that held a 13.75 percent interest in Los Angeles Television Partnership which twice filed applications challenging RKO General, Inc.'s license for KHJ-TV, Los Angeles.

(b) To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted.

27. IT IS FURTHER ORDERED, That any construction permit awarded to Allegheny as a result of this proceeding shall be made contingent on the outcome of MM Docket No. 87-433.

28. IT IS FURTHER ORDERED, That in accordance with paragraph 18 hereinabove, Allegheny shall submit an amendment to its application to the presiding Administrative Law Judge within 30 days of the release of this Order.

29. IT IS FURTHER ORDERED, That in accordance with paragraphs 19 and 20 hereinabove, Allegheny shall submit the technical data required by Section 73.316(c)(5) and (c)(7) to the presiding Administrative Law Judge within 30 days of the release of this Order.

30. IT IS FURTHER ORDERED, That in accordance with paragraph 22 hereinabove, Allegheny shall submit an amendment with the necessary certification to the presiding Administrative Law Judge within 30 days of the release of this Order.

31. IT IS FURTHER ORDERED, That the Petition to Deny the WBZZ license renewal application filed June 28, 1991, by Allegheny IS DENIED.

32. IT IS FURTHER ORDERED, That the Petition to Dismiss or Deny filed December 6, 1991, by EZ IS DENIED.

33. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard, the parties herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the release of this *Order*, file with the Commission, in triplicate, a WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issue specified in this *Order*.

34. IT IS FURTHER ORDERED, That the parties herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules give NOTICE of the hearing within the time and in the manner prescribed, and shall ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-60

In the Matter of

Co-channel Protection Criteria for Part 90, Subpart S Stations Operating above 800 MHz — RM-8028

NOTICE OF PROPOSED RULE MAKING

Adopted: March 11, 1993; Released: April 7, 1993

Comment Date: May 28, 1993
Reply Comment Date: June 14, 1993

By the Commission:

I. INTRODUCTION

1. On March 6, 1992, the National Association of Business and Educational Radio, Inc. (NABER) filed a Petition for Rule Making (Petition) concerning the rules that determine the co-channel protection criteria for 800/900 MHz private land mobile radio (PLMR) systems licensed on frequencies in the Business and General Categories.[1] In general response to the Petition, we are issuing this *Notice of Proposed Rule Making* (*Notice*) to consider revising the protection criteria and distance separations for co-channel stations operating above 800 MHz in all Part 90, Subpart S, service Pools.

II. BACKGROUND

2. In 1974, we established protection criteria and a minimum co-channel distance separation for PLMR stations operating in the 800 MHz band.[2] In 1982, we retained the 113 km (70 mi) mileage separation between Specialized Mobile Radio Service (SMR) co-channel stations, but modified the Rules to permit frequency coordinators to determine separation between non-SMR systems based on predicted 40/30 dBu signal strength contours.[3] In 1991, we adopted rules that permitted applicants for SMR stations to locate their base station transmitters closer to co-channel licensees than the standard 113 km (70 mi) separation without seeking a waiver of our rules.[4] SMR category stations were permitted to locate their base stations less than 113 km (70 mi) from existing co-channel stations either by obtaining consent from all co-channel licensees located within 113 km (70 mi) of the proposed facility, or by using the short-spacing Table in Section 90.621(b)(4) of the Rules, 47 C.F.R. § 90.621(b)(4). The Table based short-spacing distances upon the non-overlap of the existing station's 40 dBu service contour and the proposed short-spaced station's 22 dBu interference contour. Because the Table was intended as a substitute for our consideration of detailed engineering showings, the Table's parameters were designed to give a very conservative result that maximized the level of co-channel interference protection afforded existing licensees.

3. Since 1974, there have been significant improvements in equipment technical performance and system designs that have resulted in a marked increase in the development and licensing of wide-area, low-power, multi-site systems. These new wide-area systems have not been limited to SMR systems but are also being developed by eligibles in the non-SMR categories. Additionally, many SMR systems expanding into wide-area operations are requesting and utilizing frequencies assigned to non-SMR categories under the intercategory sharing provisions in the Rules. Therefore, because SMR and non-SMR systems above 800 MHz are technically and operationally similar, NABER has requested that the same interference protection criteria apply to all § 800/900 MHz systems operating under Part 90 of the Rules.[5]

III. DISCUSSION

Protection Criteria

4. In Docket No. 18262, our objective was to enable 800 MHz stations to provide a high quality signal to about 50 percent of locations for 50 percent of the time within an entire service area. To accomplish this required a signal approximately 20 dB above receiver threshold. At that time, receiver sensitivity was about 0.45 uv for 20 dB SINAD, and to obtain this signal level at a receiver, a field strength of 40 dBu was needed. For this field strength, the

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[1] Petition for Rule Making, RM-8028, filed on March 6, 1992. Comments were received from twelve parties. Reply comments were filed by NABER.

[2] *See* Second Report and Order, Docket No. 18262, 46 FCC 2d 773-775 (1974). The protection criteria provided a desired signal level of 40 dBu with an undesired signal level of 30 dBu at the edge of a station's service area. The "40/30 dBu" parameters resulted in a minimum co-channel station distance separation of 113 km (70 mi) for stations operating at maximum facility parameters of 1000 watts ERP and 305m (1000 ft) antenna height AAT.

[3] Second Report and Order, PR Docket No. 79-191, 52 RR 2d 11 (1982). For non-SMR systems, the rules specified that frequency coordinators should attempt to provide at the 40 dBu contour of the protected station an interference level of no more than 30 dBu. The 40/30 dBu ratio would generally result in a mileage separation of 113 km (70 mi). Separations of less than 113 km (70 mi) would be authorized if the terrain or other factors warranted a reduction. *See* § 90.621(c) and (d).

[4] *See* Report and Order, PR Docket No. 90-34, 6 FCC Rcd 4929 (1991). At first, the industry recommended that a 17 dB signal difference (40/23 dBu) be applied for short-spaced stations. The basic reason given for the 17 dB difference was that 17 dB was used by the cellular industry and was accepted by the Commission as a reasonable level of signal protection. The 17 dB figure was later modified to 18 dB to include a terrain variation factor, resulting in the 40/22 dBu ratio.

[5] For other filings concerning the current 40/30 dBu protection criteria, *See* Opposition of the Florida Coalition for Responsible Frequency Management, filed on January 8, 1993, and Petition for Partial Further Reconsideration, PR Docket No. 90-34, filed on October 21, 1992, by Motorola, Inc.

Commission's R-6602 curves,[6] corrected by 9 dB for mobile antenna height and 12 dB for urban clutter, indicate that a station operating at 1000 watts effective radiated power (ERP) with an antenna height of 305 m (1000 ft) above average terrain (AAT) would provide a service area slightly less than 32 km (20 mi). Over the years it has been generally accepted that the service area resulting from a 40 dBu signal level at the edge of a station's service area is adequate. Accordingly, we propose to retain 40 dBu as the desired signal level for acceptable performance at the edge of a station's service area. Because of improvements in the sensitivity of radio receivers, we seek comments on whether an acceptable signal can be achieved at the receiver with a field strength of less than 40 dBu, and whether the service areas of stations operating above 800 MHz should be calculated based on a field strength value of less than 40 dBu at the edge of the service area.

5. With respect to an undesired interfering signal level from a co-channel station, we stated in Docket No. 18262 that in order to maintain a usable quality of service with a margin to permit capture of the base station receiver by its own mobiles, an interfering signal from a distant co-channel station was required to be at least 10 dB below the desired signal. The interfering signal, therefore, could not exceed 30 dBu, and, translated into distance, the 40/30 dBu criteria required that co-channel stations be separated by a minimum of 113 km (70 mi). This 10 dB protection ratio was applied to all systems until 1991 when spacings closer than 113 km (70 mi), were, in limited circumstances, permitted for SMR applicants wishing to locate less than 113 km (70 mi) from a co-channel station without seeking a waiver. These spacings were determined using a 40/22 dBu protection ratio. *See* note 4, infra.

6. Comments on the Petition generally support a 40/22 dBu separation criteria for stations operating above 800 MHz on Business and General Category frequencies. Supporters argue that increased protection is needed because local topography results in lesser system performance than that indicated by calculations using the 40/30 dBu criteria,[7] increased mobile receiver sensitivity creates a need for greater co-channel protection,[8] wide-area systems need greater interference protection to ensure complete coverage,[9] and systems that use portables instead of mobiles need to be better protected.[10] *Also see* note 4, infra.

7. We conclude that there is merit to the arguments supporting a 40/22 dBu protection ratio. We have therefore, used the 40/22 dBu protection ratio to develop a proposed table for determining the separation distances. We note, however, the increased interest in the use of low-power, short-spaced stations for wide-area operations. We seek comment on whether the increased protection afforded existing stations by the 40/22 dBu criteria outweighs the fact that this greater protection would result in a decrease in frequency reuse from that obtainable using a 40/30 dBu ratio. We also seek comment on the assertion that because the cellular industry uses a 17 dB protection ratio, an 18 dB margin (17 dB with 1 dB correction) should apply to private land mobile radio systems.[11] Protection criteria is a most important and complex issue involving equipment parameters, system design, and propagation analysis. Our goal is to provide licensees with adequate protection and, at the same time, to achieve reasonable spectrum efficiency. Therefore, we ask for detailed comments supported by empirical data on whether 40/22 dBu is adequate, whether it is too conservative and protective, or whether some other protection ratio would be better for Part 90, Subpart S, systems operating above 800 MHz.

Standardized Protection Criteria for All Part 90, Subpart S, Radio Systems

8. Current rules require that SMR systems, except for stations meeting the short-spacing criteria, be separated by a minimum of 113 km (70 mi).[12] Non-SMR trunked systems are protected on the basis of a 40/30 dBu protection ratio.[13] Conventional 800 MHz systems that have met prescribed loading levels for channel exclusivity, are also protected on a 40/30 dBu basis.[14]

9. There is no apparent technical reason to have different protection criteria for SMR and non-SMR systems. Non-SMR system design is equivalent to that of SMR systems and thus the interference model/analysis should be the same for all systems regardless of the type of end user. Therefore, we conclude that to have separate protection criteria for SMR and non-SMR systems is restrictive, potentially confusing, and also burdensome from a licensing standpoint. Separation distances for both SMR and non-SMR stations operating pursuant to Section 90.621 of the Rules will be determined from the proposed Table. We, therefore, propose to amend the applicable rules to establish the same co-channel geographical separation criteria for all Part 90, Subpart S, operations.

Propagation Prediction Methodology

10. We recognize that the Commission's R-6602 curves are based upon average terrain conditions and may not be accurate for all possible situations because of specific local conditions. Our goal is to utilize a prediction method that is reliable for typical land mobile systems and that is not so sophisticated as to be burdensome for both applicants and the Commission. We, therefore, seek detailed comments on whether the Commission's R-6602 curves are generally adequate (as they exist or with modifications) or if some other

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[6] *See* FCC Report No. R-6602, Development of UHF and VHF Propagation Curves, September 7, 1966. The applicable curves, also given in 47 C.F.R. § 73.699, show estimated field strengths, for varying antenna heights, that are exceeded at 50 percent of the potential receiver locations for at least 50 percent of the time for the desired signal (Figure 10(b)), or for at least 10 percent of the time for the interfering signal (Figure 10(c)).

[7] Comments of Southern California Gas Co. at 2.

[8] Comments of Texas Utilities Electric Co. at 4 and Southern California Edison at 4.

[9] Comments of New England Power Service Co. at 3.

[10] Comments of Aeronautical Radio, Inc. at 4. They argue that with a 40/30 dBu criteria, low-powered portables (3 watts ERP) cannot operate simultaneously with high-powered (30 watts ERP) co-channel mobile units because the higher powered mobiles will capture the portable system's base station and prevent the portables from communicating.

[11] *See* n.4 infra. and Comments of NABER, PR Docket No. 90-34 at 10.

[12] *See* Section 90.621(b). Separation distances for the high elevation sites in California or Washington are as indicated in Sections 90.621(b)(1), (b)(2), and (b)(3).

[13] *See* Section 90.621(c).

[14] *See* Sections 90.621(d). Conventional systems above 800 MHz that participate in the regional planning process under the Public Safety National Plan (pursuant to Section 90.16) are not licensed in accordance with the 40/30 dBu protection ratio.

methodology, such as one of the many derivatives of the National Bureau of Standards' Technote 101 (including the Longley-Rice computer prediction model), or the Hata model based upon the Okamura land mobile model, would be more suitable for typical land mobile propagation predictions.[15]

Proposed Separation Distances

11. Station separation distances for SMR systems must currently satisfy the 113 km (70 mi) standard, or must meet those specified in the Table in Section 90.621(b), or may be calculated on a case-by-case basis using the 40/30 dBu criteria. As previously mentioned, the 113 km (70 mi) separation distance was determined using a 40/30 dBu protection ratio. Using a 40/22 dBu ratio as the protection criteria, would increase this separation to 137 km (85 mi). This additional separation distance does not offer any significant advantage over the current 113 km (70 mi) separation distance. The calculated distance to the radio horizon for a station with an antenna height of 305 m (1000 ft) is about 73 km (45 mi).[16] With an accepted service area of 32 km (20 mi), mobile units operating within that service area would thus be 8 km (5 mi) beyond the radio horizon of a co-channel base station located 113 km (70 mi) away. Additionally, mobiles do not communicate beyond the radio horizon of their own base station because of rapid degradation of received signals due to the earth's curvature. Thus, the 113 km (70 mi) separation distance appears to be a reasonable distance for separation of maximum facility co-channel stations.[17] We propose, therefore, to retain the 113 km (70 mi) distance between stations authorized 1000 watts ERP and 305 m (1000 ft) antenna height. We propose that stations requesting lower powers and/or antenna heights be able to locate closer to an existing station in accordance with a Table in proposed amendments to Section 90.621, as shown in the Appendix, that specifies proposed separation distances for stations of various transmitter ERP and antenna height configurations. For reasons previously discussed, the distances in this Table were calculated using the 40/22 dBu criteria. We specifically ask for comments on whether other methods of determining station separations to minimize interference, whether performed by the applicant, a frequency coordinator, or the Commission, would be more appropriate.

12. Low-power stations can be located closer than higher-powered stations. A point is reached, however, where interference to a base station from a neighboring mobile unit becomes the prime factor.[18] Taking mobile range into consideration, we conclude that a minimum separation distance is also required. We are therefore proposing that the minimum distance that will be authorized for short-spaced stations will be 80 km (50 mi) regardless of station parameters.

Transmitter Power/Antenna Height Limits

13. Section 90.635 defines and specifies the maximum power and antenna height limits for trunked, urban-conventional, and suburban-conventional systems. It also contains tables for derating transmitter power with respect to antenna heights for different required service areas. We request comments on whether there is still a need to distinguish between, and have separate rules for, stations in different settings and having different service area requirements.[19] As previously mentioned, we are also proposing that a station's nominal service area should remain 32 km (20 mi) and that the field strength at the edge of the service area should remain 40 dBu. In calculating these parameters, urban clutter is not taken into consideration. Currently, a maximum facility is one that is authorized to operate at 1000 w ERP and 305 m (1000 ft) HAAT. By not using an urban clutter correction, a station with 500 w ERP and 150 m (500 ft) would have a field strength of 40 dBu at a distance of 32 km (20 mi). We ask for comments on whether any significant advantage would be obtained if the maximum facility parameters were reduced. Additionally, in PR Docket No. 90-34, we adopted the use of a directional antenna height above average terrain (DHAAT).[20] We propose to continue using DHAAT as the parameter for antenna height.

Interference To/From Mobile Units

14. Commenters have stated that harmful interference can occur both to and from mobile units when operating under the 40/30 dBu criteria. Southern California Gas (SCG) states that a field strength of 22 dBu produces a signal strength of 0.5 uv at the mobile receiver terminals, 30 dBu produces 1.3 uv, and 40 dBu produces 4.3 uv. They also assert that current mobile receivers cannot discriminate between the 30 dBu (1.3 uv) or 40 dBu (4.3 uv) signals for either voice or data transmission. Because both of these signal levels are perceived by the receiver as "strong" signals, SCG claims a 30 dBu interference signal from a co-channel station can cause destructive interference to a mobile at the edge of its service area under the

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[15] Several commenters on the Petition indicated that the R-6602 curves were outdated. Southern California Gas, Southern California Edison, and Texas Utilities Electric recommend use of Longley Rice/Technote 101 procedures. NABER, in its reply comments, discusses the shortcomings of the Longley-Rice methodology. The Industrial Telecommunications Association (ITA) proposes that the certified frequency coordinators have authority to require that the applicant provide a contour analysis generated by a terrain-based propagation method to assist the coordinator in its frequency recommendation. Comments of ITA at para. 11. Because we are proposing that separation distances will be determined from a table, frequency coordinators will no longer be required to perform analysis and base recommendations on the 40/30 dBu protection ratio currently specified in 47 C.F.R. § 90.621(c) and (d).

[16] This distance is approximate for smooth, spherical earth with a "k" factor of 4/3. Actual distances to the radio horizon are generally less due to the earth's curvature and terrain factors.

[17] A maximum facility is one that is authorized the specified maximum transmitter ERP at the specified maximum transmitter antenna height.

[18] As an example, with a 40/22 dBu protection ratio, two co-channel stations, each with 50 w ERP and 50 m antenna height, would each have a service area of 13 km (8 mi) and would be spaced 50 km (30 mi) apart. It is highly likely that a mobile will operate beyond this 13 km (8 mi) distance despite the reduced parameters of its base station. Such mobile operation would likely create co-channel interference problems.

[19] We propose to retain the greater separation requirements relating to certain locations in California and Washington. *See* note 12, infra.

[20] *See Memorandum Opinion and Order*, (Corrected), PR Docket No. 90-34, 7 FCC Rcd 6069 (1992).

current 40/30 dBu criteria.[21] Our proposal to utilize a 40/22 dBu protection ratio will alleviate this situation to a great extent by providing an 18 dB (a factor of about 8 in absolute voltage) difference in received signal level at the terminals of a mobile receiver operating at the edge of its service area. Receivers can accommodate this difference, and the 40 dBu desired signal will "capture" the receiver from the 22 dBu undesired signal, providing interference-free communications.

15. Motorola argues that by using a 40/30 dBu protection ratio to determine short-spacing, harmful interference can occur from mobile radios operating at and beyond their own 40 dBu service contour and in proximity to the base stations of co-channel systems.[22] Motorola further claims that short-spaced stations assigned under the 40/30 dBu ratio do not receive the same interference protection as those separated by the standard 113 km (70 mi). Motorola then presents an analysis that evaluates two co-channel stations operating under the 40/30 dBu ratio. Using typical equipment specifications, the selected scenario indicates that a mobile unit operating within the 40 dBu contour of its home station would provide an undesired signal level at a short-spaced station receiver that approaches 1 microvolt. This signal is about 12 dB above the 0.25 uv sensitivity rating of current base station receivers, and Motorola claims that this signal level will cause destructive interference to lower power desired transmissions originating within the station's own 40 dBu service area.

16. Historically, we have not considered the effect of mobile units when determining protection criteria. All considerations have been limited to base-to-base interference because one cannot predict where a mobile unit will be at any time. Mobile units can travel beyond their own service area and into the service area of a co-channel system and, if operated, could cause interference to the co-channel base station. Our proposal to utilize the more stringent 40/22 dBu protection ratio will do much to minimize co-channel interference from mobile units to short-spaced base stations. In the case of the Motorola scenario, an additional 8 db of protection will be obtained and the interfering signal would only be about 4 dB above the receiver sensitivity, enabling more of the "home" mobiles to capture their own base station receiver. Additional protection for such stations could be obtained by limiting the ERP of a mobile transmitter to some value to enable a mobile to communicate with its own base station, but also reduce the potential for interference to co-channel stations by mobiles near the edge of their actual service area.[23] We ask for comments on this issue, specifically as to what effect limiting mobile ERPs may have, or any other factors which may contribute to potential interference to and/or from mobile units.

IV. CONCLUSION

17. In this proceeding, we have considered the growth and development of 800/900 MHz systems for SMR and non-SMR use. We have noted that there is a narrowing of differences in the technical and operating parameters of these systems. We have therefore concluded that having separate rules governing separation distances for SMR and non-SMR systems is no longer appropriate. Accordingly, we are proposing rules that will apply to all systems operating above 800 MHz pursuant to Part 90, Subpart S, of the Rules. We believe that these proposals will simplify the rules concerning these systems and, from a licensing standpoint, will significantly reduce the burden upon both the applicant and the Commission.

18. We also emphasize herein that until this proceeding is terminated, applications, including non-SMR applications, for 800/900 MHz systems received after the adoption date of this *Notice* will not be accepted unless they are in accordance with the conditions set forth in 47 C.F.R. § 90.621(b).

V. PROCEDURAL MATTERS

Ex parte Rules - Non-Restricted Proceeding

19. This is a non-restricted notice and comment rule making proceeding. *Ex-parte* presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.202, 1.203, 1.1206(a).

Initial Regulatory Flexibility Analysis

20. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because if the rule amendments are promulgated there will not be a significant impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The proposed rule changes set forth in this *Notice* amend certain technical standards and have no negative economic consequences. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

Comment Dates

21. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commissions Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **May 28, 1993,** and reply comments on or before **June 14, 1993.** To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

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[21] Comments of Southern California Gas Co., RM-8028, RM-8029, RM-8030 at 3.

[22] Motorola Petition for Partial Reconsideration, PR Docket No. 90-34, at 9 and Technical Appendix.

[23] A reduction in mobile ERP will reduce the "talk in" range of a mobile when compared to the "talk out" power of its higher powered base station. Base station receivers are typically about 6 dB more sensitive than mobile receivers, thus somewhat extending a low-power mobile's "talk in" range.

22. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r).

23. For further information concerning this rule making, contact Eugene Thomson, Private Radio Bureau, Room 5202, Federal Communications Commission, Washington, D.C. 20554, telephone (202) 634-2443.

VI. ORDERING CLAUSE

24. IT IS ORDERED that, effective March 12, 1993, and until otherwise notified, the Commission will not accept applications for 800/900 MHz systems that do not meet the conditions set forth in 47 C.F.R. § 90.621(b).

FEDERAL COMMUNICATION COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: Secs. 4, 303, and 332, 48 Stat. 1066, 1082, as amended, 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 90.621 is amended by revising paragraph (b) introductory text and the first sentence of paragraph (b)(3), revising paragraph (b)(4), removing paragraphs (b)(5), (b)(6), (c), and (d), and redesignating paragraphs (e), (f), (g), (h), (i) and (j) as paragraphs (c), (d), (e), (f), (g) and (h), respectively, to read as follows:

§ 90.621 Selection and assignment of frequencies.

* * * * *

(b) Trunked and conventional systems authorized on frequencies listed in this Subpart, except for those systems authorized pursuant to § 90.621(g), will be afforded protection solely on the basis of fixed mileage separation criteria. The separation between co-channel systems will be a minimum of 113 km (70 mi) with the following exceptions:

* * * * *

(3) Except as indicated in paragraph (b)(4) of this section, trunked systems located in the State of Washington at the following locations shall be separated from co-channel systems by a minimum of 169 km (105 miles). * * *

(4) Stations may be separated by less than 113 km (70 mi) by meeting certain transmitter ERP and antenna height criteria. The following Table indicates permissible separation distances to provide protection to existing co-channel stations for various transmitter power and antenna height combinations. The minimum separation permitted will be 80 km (50 mi).

STATION SEPARATION TABLE

Existing Station ERP/DHAAT	Distance Between Stations (km) [1] [2] — Proposed Station ERP (watts)/DHAAT (meters) [3] [4]											
	1000 /305	1000 /150	1000 /50	500 /305	500 /150	500 /50	250 /305	250 /150	250 /50	50 /305	50 /150	50 /50
1000/305	113	113	113	113	113	105	113	109	97	108	96	83
1000/150	113	113	106	113	108	95	113	99	87	98	86	80
1000/50	113	113	94	113	96	83	104	87	80	86	80	80
500/305	113	113	112	113	113	101	113	105	93	104	92	80
500/150	113	113	103	113	105	92	113	96	84	95	83	80
500/50	113	113	89	110	92	80	100	83	80	82	80	80
250/305	113	113	108	113	110	97	113	101	89	100	88	80
250/150	113	111	98	113	100	87	108	91	80	90	80	80
250/50	113	100	86	107	89	80	97	80	80	80	80	80
50/305	113	111	98	113	100	87	108	91	89	90	80	80
50/150	113	103	89	110	92	80	100	83	80	82	80	80
50/50	113	96	82	113	85	80	93	80	80	80	80	80

[1] Separations for trunked systems on Santiago Peak, Sierra Peak, Mount Lukens, and Mount Wilson (CA) and the locations in the State of Washington listed in § 90.621(b)(3) are 56 km (35 mi) greater than those listed in the Table above. In the event of conflict between this table and the table of additional California high elevation sites shown in § 90.621(b)(2)(ii), the latter will apply.

[2] Distances shown were derived from the R-6602 curves and are based upon a non-overlap of the 22 dBu interference contour of the proposed station with the 40 dBu contour of the existing station(s). No consideration is given to the 40 dBu service contour of the proposed station and the 22 dBu contour of the existing station(s).

[3] When either the proposed or existing station's ERP and/or DHAAT are not indicated in the table, the next higher value(s) must be used.

[4] The directional height of the antenna above average terrain (DHAAT) is calculated from the average of the antenna heights above average terrain from 3 to 16 km (2 to 10 mi) from the proposed site along a radial extending in the direction of the existing station and the radials 15 degrees to either side of that radial.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-35

In the Matter of

Amendment of the Commission's Rules To Provide Channel Exclusivity To Qualified Private Paging Systems at 929-930 MHz	RM-7986

ORDER

Adopted: March 29, 1993; Released: April 6, 1993

By the Commission:

1. On February 18, 1993, we adopted a *Notice of Proposed Rule Making* in this proceeding in which we proposed to grant channel exclusivity to qualified local, regional, and national private carrier paging (PCP) systems in the 929-930 MHz band.[1] In the *Notice*, we imposed a freeze on all new applications at 929-930 MHz while the proposal was under consideration.[2] We considered such a temporary freeze to be in the public interest because of the potential impact of the proceeding on the availability of frequencies to both existing and future 900 MHz paging systems.[3]

2. Since the *Notice* was adopted, we have become aware that the freeze is impairing the ability of some PCP operators to develop or expand their systems based on plans formulated prior to the adoption of the *Notice*.[4] As a result, the freeze may inadvertently be stranding investment in ongoing projects while delaying the ultimate provision of paging service to prospective customers. This potential negative impact of the freeze is sufficiently widespread that we are concerned it may outweigh the public interest benefits that caused us to implement it.

3. Accordingly, we have decided to lift the freeze as of the effective date of this *Order*. To ensure equitable treatment of all parties, we prefer a total lifting of the freeze to a partial rollback that would apply to some but not others. Therefore, all 900 MHz paging applications found acceptable for filing will be processed in due course under our existing rules.

4. The existing rules, we wish to emphasize, require all 900 MHz private paging frequencies to be shared and all licensees to cooperate in the selection and use of frequencies to minimize interference with each other.[5] We expect all parties in the application and coordination process to continue complying fully with these requirements while this proceeding is pending. In addition, we remind prospective applicants of our existing requirement that authorized stations be constructed and operating within eight months of licensing.[6] This rule will be strictly adhered to, and any licensee that fails to meet this requirement will be subject to automatic cancellation of its license.

5. Our lifting of the freeze is procedural in nature and should not be construed as in any way predetermining the outcome of the underlying rule making. As is the case with all existing authorizations, the status of any authorization granted in the wake of this *Order* is subject to change as a result of subsequent decisions made in this proceeding.

6. It is therefore ORDERED that, pursuant to the provisions of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), we will resume acceptance of applications for one-way paging licenses in the 929-930 MHz band as of the adoption date of this Order.

7. For further information, contact the Consumer Assistance Branch, Licensing Division, Private Radio Bureau, (717) 337-1212.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[1] *Notice of Proposed Rule Making*, PR Docket No. 93-35, FCC 93-101 (released March 31, 1993). *See also*, Rep. No. DC-2341, February 26, 1993.

[2] *Notice*, ¶ 41.

[3] *Id.*

[4] *See, e.g.*, March 16, 1993 letter to Ralph Haller, Private Radio Bureau Chief, from Jay Kitchen, President, National Association of Business and Educational Radio, Inc.

[5] *Arch Capitol District, Inc.*, 3 FCC Rcd 6191 (1988). *See* 47 CFR §§ 90.173(a),(b).

[6] *See* 47 CFR § 90.155(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-510

In re Applications of

RAMON RODRIGUEZ AND ASSOCIATES, INC. File No. BPH-821208AA

DAVID ORTIZ RADIO CORPORATION File No. BPH-830722AL

For a construction permit for a New FM Station at Lajas, Puerto Rico

Appearances

Christopher D. Imlay, Esq. on behalf of Ramon Rodriguez and Associates; *Robert A. DePont, Esq.* on behalf of David Ortiz Radio Corporation; and *Robert Zauner, Esq.* on behalf of the Federal Communications Commission.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE JUDGE JOHN M. FRYSIAK

Issued: March 31, 1993; Released: April 6, 1993

Preliminary Statement

1. Following the decision of the United Sates Court of Appeals in *David Ortiz Radio Corporation v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991), the Commission, by *Memorandum Opinion and Order*, 7 FCC Rcd 2633 (1992), remanded this proceeding involving the applications of David Ortiz Radio Corporation ("Ortiz") and Ramon Rodriguez and Associates, Inc. ("RRAI") for hearing and preparation of a Supplemental Initial Decision on the following issues:

(i) To determine whether Ramon Rodriguez and Associates, Inc. made material misrepresentations in certifying to the Commission that it had reasonable assurance of the availability of its specified transmitter site in its March 18, 1983 amendment and its July 7, 1983 reinstatement of its original proposal.

(ii) To determine whether Juan Carlos Rodriguez Maldonado abused the Commission's processes by impersonating an FCC employee and whether Ramon Rodriguez and Associates, Inc. submitted false sworn statements with respect to this matter.

(iii) To determine whether David Ortiz offered Jorge Morales Gonzague a position of employment at station WMIO(FM), Cabo Rojo, Puerto Rico, and whether Ortiz Radio Corporation submitted a false sworn statement with respect to this matter.

(iv) To determine, from the evidence adduced pursuant to Issues (i) and (ii), above, whether Ramon Rodriguez and Associates possesses the basic qualifications to be the licensee of the facilities sought herein.

(v) To determine, from the evidence adduced pursuant to Issue (iii), above, whether David Ortiz Radio Corporation possesses the basic qualifications to be the licensee of the facilities sought herein.

2. A prehearing conference was held May 15, 1992 and the hearing was held September 22, 1992 and September 23, 1992. Thereafter, by *Memorandum Opinion and Order*, FCC 92M-1057, released November 24, 1992, the Presiding Judge received Ortiz Rebuttal Exhibit 4 into evidence and the record was closed.

Findings of Fact

RRAI Transmitter Site Misrepresentation Issue.

3. Initially Ramon Rodriguez Guzman ("Rodriguez"), RRAI's President, Director and 50% stockholder picked the Cerro Guaniquilla site for RRAI's transmitter because of its favorable location and because it was identified as the site specified by David Ortiz in his application (RRAI Remand Ex. 1). Rodriguez was informed by area residents that the land was government owned (*Id.*). This information was confirmed by employees of the Natural Resources Agency in Boqueron (*Id.*). One of the employees indicated that the land would be available for use as a transmitter site (*Id.*). To secure the use of the site, Rodriguez visited the Natural Resources Agency office in San Juan to make application for the use of the site (*Id.*). Upon making application on November 18, 1982, he paid a filing fee of $240.00 for a land users permit (RRAI Remand Ex. 1), Attachment B). Rodriguez then on November 20, 1982 filed the FCC application designating the Punta Guaniquilla land as RRAI's transmitter site (RRAI Remand Ex. 1, Attachment A).

4. Subsequently, after several visits to the same office because of no action on RRAI's application for land use, Rodriguez was informed in December of 1982 by John A. Stewart that the Punta Guaniquilla land did not belong to his department but was rather private property. Rodriguez then revisited the area of the proposed site trying to locate the owner (RRAI Remand Ex. 1). In the process of his search he learned from the Office of the Registry in Mayaguez, Puerto Rico that the lands were Puerto Rico Government lands (RRAI Remand Ex. 1, Attachment A). In making telephone calls to the different divisions of Natural Resources he learned from Myrna Robles that the property could belong to the Conservation Trust of Puerto Rico (*Id.*). Contact with Mrs. Faore of the Director's Office of the Conservation Trust provided no information except that Rodriguez was referred to Mr. Ivan Sanchez, Codremar Director (*Id.*). Calls to the given number went unanswered (*Id.*). Subsequently, Rodriguez found a number listed for Codremar in the telephone book. Employees at that number could give no information but he was told that he could reach the Secretary at a number which he learned was assigned to Francisco Javier Blanco ("Blanco"), Director of the Conservation Trust (*Id.*). At a visit to Blanco's office on January 10, 1983, Rodriguez was

informed by Blanco that the Cerro Guaniquilla site was destined for a bird sanctuary and use as a transmitter site would not be permitted (*Id.*).

5. Rodriguez avers that also on the same date, January 10, 1983, he received a call from his bother, David Rodriguez, who had that day and at his prior request, met with Puerto Rico Forestry Division representative at Punta Guaniquilla in a continuing effort to determine the control of Cerro Guaniquilla area (RRAI Remand Ex. 1). His brother informed him that he found out that the land belonged to Codremar, a subsidiary of the Natural Resources Agency (*Id.*). It did not appear to Rodriguez that Codremar had any connection with the Conservation Trust (*Id.*) Rodriguez knew that the Conservation Trust was not part of the Department of Natural Resources (*Id.*)

6. Rodriguez states that at this stage he was confused. He had received indications that the Cerro Guaniquilla site was owned variously by four different entities, namely, the Department of Natural Resources, the Codremar, the Conservation Trust of Puerto Rico and private ownership (*Id.*). Additionally, Rodriguez questioned Blanco's assertion as to ownership because he knew that the Mayaguez property records were five years behind in sequence (Tr. 648). Because of the conflicting reports, he attributed no significance to the statement of Blanco that the site was owned by the Conservation Trust and was unavailable for private use (RRAI Remand Ex. 1). Rodriguez also took into account the fact that David Ortiz had specified the same site in his application (*Id.*). Rodriguez believed that if the site was available to David Ortiz it was also available to RRAI (*Id.*). As a result, Rodriguez concluded that it was not unreasonable to continue to specify the Cerro Guaniquilla site (*Id.*). In an attempt to resolve the ownership question, Rodriguez continued to meet with other Natural Resources representatives after January 10, 1983, including one Mr. Francisco and one Angel David Gonzales to determine the actual ownership of the site (*Id.*). Rodriguez asserts that to this day he still is not certain what the ownership of the site Cerro Guaniquilla is (*Id.*). RRAI notes that David Ortiz specified the Cerro Guaniquilla site in three filings, *viz* applications filed August 31, 1982, November 30, 1982 and July 22, 1983, respectively. (Official notice of application filings taken. *See*, RRAI Proposed Findings, footnote 10; FM Minority Broadcasting filed its application April 20, 1983 specifying the same site.)

7. In March of 1983 RRAI discussed with its communications counsel as to what city of license should be specified in its application (*Id.*). It was then believed by RRAI principals that this proceeding might turn on a comparison of communities. Because Boqueron had no local radio station it was thought that it was the best city for which to apply (*Id.*). In light of this thinking, the RRAI application was revised to designate Boqueron as the proposed city of license (*Id.*). The engineering exhibit was simply restated and the transmitter site also was restated as being Cerro Guaniquilla since the RRAI principals believed that the Cerro Guaniquilla site was available (*Id.*).

8. Subsequently, after reviewing some studies, the city of license matter was rethought and it was decided that Cabo Rojo should be specified, with a proposal for secondary service to Boqueron (*Id.*). By letter dated May 23, 1983, RRAI instructed its communications counsel to withdraw the Boqueron amendment which at that point had not as yet been acted upon. An amendment to that effect was filed July 7, 1983 (*Id.*).

9. According to Rodriguez it was because of the uncertainty of ownership regarding site ownership and because he had received advice from RRAI's consulting engineers that RRAI should find a better site in terms of area and population coverage that he sought and secured a new site in June of 1983 (*Id.*).

10. The site change amendment was filed in August of 1983. RRAI did not address any loss of site because RRAI continued to believe that, although there was uncertainty about the ownership of the site, the site would be available to it if it was available to Ortiz and FM Minority. In an October, 1985 amendment, Ortiz reported a site change stating that the Cerro Guaniquilla site, assumed to be owned by a private individual, was in fact owned by one Mr. Ramirez who sold the land a few months before July, 1985. (Official notice of petition and amendment taken.)

Abuse of Process - Misrepresentation Issues - RRAI

11. The above-named issues were based on the prehearing declarations of Ortiz Postigo ("Postigo") made March 28, 1988 and May 20, 1988, respectively. Ortiz' direct case on this issue consists of Postigo's declaration made August 31, 1992 wherein he reaffirmed the two previous declarations.

12. Postigo resides in Cabo Rojo, Puerto Rico (Tr.673) and is a cousin of David Ortiz (Tr. 672). He is a photographer and the owner of Carlitos Photo Store in Cabo Rojo (Ortiz Remand Ex. 8, Attachment 1). He advertises on Ortiz' radio station (Tr. 692).

13. In his March 28, 1988 declaration, Postigo asserted that in February of 1988, Juan Carlos Rodriguez Maldonado ("Maldonado") came to his store accompanied by another individual and requested that some photographs of Radio Station WEKO tower be taken (Ortiz Remand Ex. 8, Attachment 1). Postigo stated that he inquired of Maldonado whether he had permission of the owner David Ortiz to take such photographs (*Id.*). According to Postigo, Maldonado responded that permission was not needed to take such photographs (*Id.*). Because Maldonado did not have Ortiz' permission, Postigo refused the request (*Id.*).

14. Postigo asserted further that Maldonado subsequently on the same day returned to his store and stated that he was from the FCC and that he wanted to ask some questions about Radio Station WEKO and Radio Station WMIO (*Id.*) According to Postigo he asked Maldonado for identification to verify that he was from the FCC but Maldonado was unable to do so and so Postigo declined to answer any questions (*Id.*).

15. By the May 28, 1988 declaration, Postigo supplemented his previous declaration to reflect that (1) he denies that Maldonado identified himself as being from RRAI and that he was a part of the famous "Andino's Trio"; (2) he did not recognize Maldonado as a member of the "Andino's Trio", since he was unfamiliar with that group; and (3) he stands by his statement that Maldonado represented that he was an FCC employee (Ortiz Remand Ex. 8, Attachment 2).

16. Though the May 28, 1988 declaration states that Postigo was unfamiliar with the "Andino's Trio", at hearing he said he was familiar with the musical group before May of 1988 (Tr. 710, 730). Although at deposition he denied ever having been given a copy of his March 28, 1988 declaration, at hearing he admitted that he was given

a copy of the declaration after he signed it (Tr. 713). He testified that he did not give it a lot of importance, though it was made under penalty of perjury (Tr. 714).

17. Although Postigo stated in his May 28, 1988 declaration that Maldonado represented himself as an FCC employee (para. 14, above), at deposition Postigo said that Maldonado did not use the word "employee" and at hearing he said he is "not using that word now either" (Tr. 696). Postigo admitted that he did not recall the words that Maldonado used. He said it was "something like he was part of, or was an employee of" (Tr. 696). Postigo also claimed that Maldonado said that he was "from the FCC, an agent of FCC" (Tr. 696), but, then said that Maldonado "told him something related to the fact" (Tr. 697). At deposition Postigo stated that "I don't recall the word he used first, it was something about the Federal Communications Commission" (Tr. 697). He also said at deposition that he didn't recall the word used by Maldonado in indicating his identity (Tr. 698).

18. At hearing Maldonado testified that he is a 1% stockholder of RRAI and that he traveled to Cabo Rojo in February, 1988 pursuant to instructions received from his father Ramon Rodriguez Guzman (RRAI Remand Ex. 2). One purpose of his visit was to establish that WEKO(AM) licensed to Ortiz, and WMIO(FM) licensed to Maria I. Ortiz Aviles, David Ortiz' daughter, were under the same roof and that the microwave line for the FM was located on the AM tower (*Id.*). He was accompanied by his friend Juan N. Esquerdo ("Esquerdo") who was brought along to witness the happenings that were to ensue (*Id.*). He and Esquerdo first visited the radio stations and then went to Cabo Rojo to hire a photographer to take pictures of the WEKO(AM) antenna (*Id.*). At the photo shop Maldonado talked to a man he later learned to be Postigo (*Id.*). He introduced himself and Esquerdo and told Postigo of his need to have photographs of the tower (*Id.*). Postigo asked him whether he had the owner's permission (*Id.*). Maldonado answered that no permission was necessary for the radio stations were for public service (*Id.*). Postigo refused to take pictures (*Id.*) whereupon Maldonado and Esquerdo left the photo store (*Id.*).

19. Subsequently, Maldonado returned to the photo store with Esquerdo and talked again with Postigo (*Id.*). He informed Postigo that he was associated with RRAI and was a singer with the well known Andino's Trio (*Id.*). According to Maldonado, Postigo then allowed that his face was familiar to him (*Id.*). Maldonado told Postigo that RRAI had a case at the Federal Communications Commission concerning a license for a radio station and that he needed pictures to demonstrate that "the person had two stations in the same place" (*Id.*). Postigo refused to take pictures unless permission had been given (*Id.*).

20. Esquerdo testified that he has had no business connection with RRAI, the Rodriguez family or Ruth Hernandez, but that he had known Maldonado (RRAI Remand Ex. 3). According to Esquerdo in February of 1988, he was requested to accompany Maldonado on a trip to Cabo Rojo to make certain investigation of the radio stations of the Ortiz family and to verify as a witness the information that might be discovered (*Id.*). Maldonado and he first visited the Ortiz radio stations and then went to a photo store to hire a photographer (*Id.*). There Maldonado introduced himself and Esquerdo to a gentleman who attended them and stated to him the purpose of their visit (*Id.*). The gentleman asked Maldonado whether he had permission to take the pictures (*Id.*). Maldonado answered that permission was not necessary but the gentleman refused to take any pictures (*Id.*). Maldonado then said that he would try to get permission (*Id.*). Subsequently, Maldonado and Esquerdo returned to the photo store (*Id.*). Maldonado asked for Postigo and then told him that he was with the RRAI and that he was a singer with the Andino Trio (*Id.*). Postigo said that he thought he had seen Maldonado before and told him that Maldonado was familiar to him (*Id.*). According to Esquerdo, Maldonado told Postigo of the case at the Federal Communications Commission regarding a license for a radio station and that he needed photographs to demonstrate facts about the radio station (*Id.*). Postigo stated that he would not take pictures without permission (*Id.*). Esquerdo denies that Maldonado ever told anyone in his presence that he worked for the FCC, or was an FCC inspector or agent, or that he was in any way a representative of the FCC (*Id.*).

Offer of Employment - Misrepresentation - Ortiz

21. In his written direct testimony, Ortiz reaffirmed the statements he made in his Declaration filed May 17, 1988 (Ortiz Remand Ex. 9). Additionally he stated that he reviewed WEKO(AM) logs for the period February 15, 1988 to February 29, 1988 and reaffirms that WEKO did not broadcast the speech of Governor Hernandez Colon (*Id.*). He also denied that he had made an appointment to meet with Morales in Cabo Rojo on April 25 or 26, 1988, and in support of this allegation he stated that he had planned in advance to be at that time at San Juan for a deposition session and in fact was in San Juan on both days (*Id.*).

22. In his Declaration dated May 16, 1988 (filed May 17, 1988), Ortiz denied that he had offered Morales (Jorge Morales Gonzague) a job at his daughter's station WMIO(FM), Cabo Rojo and stated that neither he nor any other Ortiz principal has or exercises control of that station (*Id.*, Attachment 1). He stated further that Morales on several occasions in March of 1988 telephoned to speak to him (*Id.*). According to Ortiz, Morales did not state the reason for his call the first three times he called (*Id.*). The last time he called he stated to the secretary that he was conducting some sort of survey of radio stations for Senator Deynes Soto's campaign (*Id.*).

23. According to Ortiz, about a week after his last call, Morales came to the Ortiz radio station and unannounced walked into his office and introduced himself stating that he called on the phone many times before (*Id.*). Ortiz then invited him to have a seat and they talked (*Id.*). Morales described his previous broadcast experience as a salesman, explaining the circumstances of his leaving his last job in broadcasting (*Id.*). He also stated that he was presently working for Senator Deynes Soto, but that he knew that Ortiz was an applicant for a construction permit for an FM station at Lajas and would like to work for him as a salesperson in the event Ortiz is awarded the permit (*Id.*). Morales also indicated that he could program music because he knew what people liked to hear (*Id.*). According to Ortiz he thanked Morales for visiting him and that, if he were awarded the permit, he would contact him, but that presently he had no job to offer him; at which point Morales departed (*Id.*).

24. Ortiz averred further that he had no other contact with Morales and that during the meeting with him Morales did not inquire about the tape recording of Governor Colon's speech in favor of Senator Deynes Soto's candidacy (*Id.*). Ortiz concluded that in investigating the allegations made by Morales in this proceeding he was informed by

Senator Deynes Soto the Governor's speech referred in Morales' statement was made in Hormigueros, Puerto Rico in late February, 1988, but a review of the logs conducted by his staff disclosed that WEKO(AM) did not broadcast that speech (*Id.*).

25. In his affidavit dated April 30, 1988, Morales stated that he worked during 1988 as a communications officer of a Puerto Rico Commonwealth senator, one Miguel Deynes Soto (RRAI Remand Ex. 4). According to Morales, Soto asked Morales to acquire an audio tape of a speech made by Governor Rafael Hernandez Colon in favor of Senator Deynes Soto's candidacy (*Id.*). Morales traveled on March 2, 1988 to Cabo Rojo, to WEKO(AM) and "was attended by David Ortiz' son, Wilkins, who gave (Morales) the tape." (*Id.*) After the delivery of the tape, David Ortiz and Morales discussed various subjects, among which Ortiz offered Morales a job at WMIO(FM). Morales indicated that he was interested in a job as the director of programming, and later, on April 18, 1988, David Ortiz formally offered Morales the position of director of programming at WMIO(FM), Cabo Rojo, Puerto Rico (*Id.*). Morales initially accepted, but later turned down the job offer: He was supposed to return to WEKO on April 25 or 26, 1988 to conclude details of employment, but he decided to continue working with Senator Deynes Soto and so did not go to that appointment (*Id.*). The record reveals that Morales' first affidavit, which revealed the job offer made to him by David Ortiz, was filed with the Commission in an RRAI reply pleading filed in response to the opposition to the RRAI Motion to Enlarge Issues on May 2, 1988. (Official notice taken.)

26. Morales' second affidavit, dated May 16, 1988 (RRAI Remand Ex. 5) reveals further events intimately connected with the job offer made to Morales by David Ortiz. On May 9, 1988, at approximately 1:30 p.m., one Manuel Feliciano visited Senator Deynes Soto's office in Aguadilla, Puerto Rico, where Morales worked, to talk with Morales. Feliciano identified himself as a private investigator, and the president of Caribbean Detective Bureau and Academy, Inc. Morales invited Feliciano into the office to talk (*Id.*). Feliciano would not speak with precision as to what the visit was about, but stated that it was about a conflict over some radio stations, one in Cabo Rojo and involving other persons; that Feliciano was interested in knowing Morales' movements; and that he was making an approach because "the person he was representing was a very nice person and didn't care for money" (*Id.*). When Morales asked for the name of the person, Feliciano said he could not give it, but would contact Morales later, after determining whether he could reveal the person's name (*Id.*). Morales believed at the time that Feliciano had been referring to Ortiz (*Id.*). They agreed to meet to continue the discussion the next day at 12:00 noon, but Feliciano did not show up (*Id.*). Feliciano's car tag was recorded by Morales, as Morales became suspicious during the encounter. Morales reported the encounter to RRAI, and a new declaration was prepared and executed by Morales, but it was not used, as the requested issues against Ortiz were never added until the Commission's remand.

27. On cross-examination at hearing, Morales testified that before going to Cabo Rojo to pick up the tape recording of Governor Colon's speech he called the station and spoke with David Ortiz who told him to pick up the tape in person (Tr.756-757). On visiting the station he first met Wilkins Ortiz who took him to David Ortiz' office (Tr. 762). Morales was given the tape by Wilkins (Tr. 763-764). At that time Morales spoke with David Ortiz about broadcasting (Tr. 768). According to Morales he had worked with David Ortiz in Network Notiuno. David Ortiz was a director of the network (13 radio stations) and Morales was a radio news announcer. Morales believes that David Ortiz had heard Morales' name "everyday" (Tr. 768). Subsequently, on April 18, 1988 David Ortiz, by phone, offered Morales a job at WMIO, 102.3 (Tr. 774) and Morales accepted the offer, the details to be worked out later (Tr. 774). Morales had agreed to come to the station on the 25th or 26th of April, 1988 to conclude the details (Tr. 775), but hearing some "stuff that was on the cloudy side" Morales decided to continue to work for Senator Deynes Soto and did not keep the appointment (Tr. 775).

28. Morales stated that his testifying in this proceeding is the result of his meeting by chance with Juan Carlos Maldonado in Aquadilla, Puerto Rico. The two had lunch and Morales told Juan Carlos about the Ortiz job offer (Tr. 777). Juan Carlos told him that the station was not owned by David Ortiz and asked Morales if he were available to make a declaration stating the facts (*Id.*).

29. In his rebuttal testimony, David Ortiz stated that it was his station's policy to require that requests for political tapes be in writing but that he never received a written request from Morales (Tr. 834). Ortiz also stated that WEKO does not record programs that it does not originate (Tr. 835); and most of the time a requester would be provided with a reel-to-reel tape rather than a cassette tape (Tr. 837). He stated further that he never was employed by the Notiuno Network (*Id.*) and that he has met Morales only on one occasion (Tr. 840).

30. On cross-examination Ortiz stated that WEKO was an official link in the Notiuno Network (Tr. 843). WEKO's billhead reads "Official link of the Notiuno Network in the Mayaguez Area" (RRAI Rebuttal Ex. 1, p. 4). Ortiz stated that WEKO had been a Notiuno affiliate for some 14 years (Tr. 886).

31. David Ortiz, at deposition, stated that WEKO never broadcast a program that contained any speech of Governor Hernandez Colon (Tr. 862). Ortiz reiterated that repeatedly at the hearing (Tr. 864, 865, 880). He stated that he personally checked the logs for the month of February, 1988 (Tr. 893). Ortiz also proffered David Ortiz' son, Wilkins, as a rebuttal witness, solely to testify that he had not seen Morales at WEKO, but had merely talked with Morales by telephone about a political program (Tr. 908). Wilkins denied giving Morales a tape (Tr. 909) and WEKO broadcasting Governor Colon's speech (Tr. 909). Wilkins duties at WEKO, however, do not include keeping track of political broadcasts made on WEKO (Tr. 918).

32. In fact, it appears that there was a speech aired on WEKO in early February, 1988, by Governor Hernandez Colon in favor of Senator Deynes Soto. RRAI Rebuttal Exhibit 5 is a statement under penalty of perjury signed by one Hector Colon, who is affiliated with the Popular Democratic Party of Puerto Rico. His statement is as follows:

> That on the 7th day of February, 1988, I was present at the activity of the Popular Ladies at the Sports Palace of Mayaguez, Puerto Rico, which program was transmitted through WEKO radio station of Cabo Rojo. On that day the Governor of Puerto Rico, the Honorable Rafael Hernandez Colon addressed the persons in attendance and in his message he endorsed

various candidates of his party and amongst which there was the Senator Miguel Deynes Soto. An invoice dated February 5, 1988, in the amount of $635.00, and another in the amount of $205.00 for a total of $840.00, went by the radio station WEKO, were paid by our party with check number 010245.

33. David Ortiz claimed he knew nothing about Colon, or the entire matter, but documents from WEKO and those filed with the Puerto Rico Elections Commission prove otherwise. RRAI Rebuttal Exhibit 1 is a copy of an official WEKO bill dated February 5 (before the matter was aired) addressed to the "Popular Democratic Party," attention, Sr. Hector Colon. This bill was in the amount of $205.00, and was for transmitting directly from the Palace of Sports in Mayaguez for 42 minutes (for Notiuno of Mayaguez) the assembly of the Popular Ladies on February 7, 1988. The bill reflects the stamped signature of David Ortiz.

34. Another WEKO bill, (RRAI Rebuttal Ex. 4) was addressed to the Popular Ladies, and also dated February 5, 1988, for two hours of transmission on February 7, between 11:00 a.m. and 1:00 p.m. directly from the Sports Palace in Mayaguez. This official bill, as did the one for $205.00, also contained the stamped signature of David Ortiz. With respect to both of these bills, the Popular Democratic Party paid a total of $840.00 to WEKO by official check of that party, #010245. A copy of the check was admitted in evidence as RRAI Rebuttal Exhibit 3.

35. David Ortiz filed, over his original signature, duly notarized, a sworn statement on March 9, 1988 with the State Electoral Commission of the Commonwealth of Puerto Rico, as required, listing all political broadcasts aired on WEKO during the month of February, 1988. The form of the statement, and its attachment, is prescribed by law in Puerto Rico (Tr. 853). During the entire month of February, David Ortiz swore, under penalty of perjury, that Ortiz, over WEKO, had charged a total amount of $1,326.00 for political broadcasts, as itemized on an attached report form. The official report form, which David Ortiz signed in a box marked "Double Checked by:" lists the Popular Ladies broadcasts for two hours, 42 minutes on the 7th of February, 1988, for which the total of $840.00 was charged, and paid by the Party. The only other entry on the form is a series of spots for a local municipal candidate run during the weekend February 25 through 28, 1988, for which a total of $485.00 was charged.

36. Ortiz Rebuttal Exhibit 2 are the program logs of WEKO from February 1 through February 14, 1988. Ortiz had originally tendered only the logs from February 15, 1988 through the end of the month, in an effort to establish that no political speech of the type alleged by Morales was aired. Ortiz Rebuttal Exhibit 2 (pp. 4 and 10) reveals the entry of the commencement of the Popular Ladies broadcast at 11:00 a.m. and the termination at 1:44 p.m. on February 7.

37. Further, Ortiz stated a number of explanations surrounding the hiring of Feliciano, the private investigator. Ortiz testified at hearing that he hired Feliciano, the detective, for personal protection (Tr. 883). Ortiz testified that he wanted to determine whether Morales had any criminal record "in any town or around, in case I had to bring it up to the Federal Communications Commission hearing, and to protect myself because I wasn't feeling so good, so comfortable when he visited by office, my radio station." (Tr. 883-884). He also stated that "I was very worried about myself, the way he jumped into my office, the way he burst into my office and says, 'oh hi, David, my name is Jorge Morales'..." (Tr. 895). Ortiz said he was concerned for his personal safety and because he didn't know why Morales visited Ortiz (Tr.897). At deposition, however, Ortiz had stated that he hired Feliciano to find out "what kind of person" Morales was. Ortiz further claimed that he received a report from Feliciano that Morales was "very difficult to be found" (Tr. 896), but that Feliciano had found Morales in Senator Deynes Soto's office in Aguadilla, and talked to Morales (Tr. 888).

38. In Rebuttal Exhibit 4 tendered after the hearing, Ortiz asserted that he did hire Feliciano to seek information regarding Morales "as a result of the allegations Morales had made about (Ortiz)" (Ortiz Rebuttal Ex. 4). However, he denied ever authorizing Feliciano to make any offer or suggestion of money to Morales (Ortiz Rebuttal Ex. 4).

Conclusions of Law

Transmitter Site - Misrepresentation Issue - RRAI

39. At issue is whether RRAI intentionally concealed the loss of its transmitter site from the Commission (See, the *Memorandum Opinion and Order*, 7 FCC Rcd. 2633 (1992)).

40. The record shows that RRAI had been told, prior to the initial specification of the site in its application filed December 8, 1982, by a representative of the Department of Natural Resources in Boqueron that the site would be available to it, upon application. It made application to the Department of Natural Resources and paid a filing fee. It was because of inaction on RRAI's application for land use that Rodriguez followed up on it by visiting the Department. After making several visits to the Department he was informed by a Department representative in December of 1982 that the site in question was private property. In searching the land records in Mayaguez, Puerto Rico, Rodriguez learned that the site was on government owned land after all. After making several calls to various divisions of the Department of Natural Resources he was referred to the Conservation Trust office. Contact there referred him to Codremar. Calls to the given number went unanswered. Subsequently Rodriguez found a telephone book listing for Codremar. An employee answering a call to that number could give no information but gave the Secretary's phone number which turned out to be a number assigned to the Director of Conservation Trust, Francisco Blanco. At a visit to Blanco's office on January 10, 1983 Rodriguez was told that the Cerro Guaniquilla was slated for use as a bird sanctuary and a tower would not be permitted. But on the same day Rodriguez got a call from his brother David who told him that he met the Puerto Rico Forestry Division representative and learned that the land of the proposed site belonged to Codremar, a subsidiary of Natural Resources. At this point Rodriguez was at sea as to what or who to believe. It did not appear that Codremar had any connection with the Conservation Trust. He also knew that the Conservation Trust was not part of the Department of Natural Resources. Rodriguez also had earlier discovered that the Mayaguez property records were five years behind in sequence. Additionally Rodriguez was aware that a competing applicant, David

Ortiz, specified the same site RRAI did. Rodriguez believed that if the site was available to Ortiz, it was also available to RRAI.

41. Rodriguez asserts that in light of these developments he thought it reasonable to continue to specify the Cerro Guaniquilla site. He continued, however, to meet with other Natural Resources representatives after January 10, 1983, to determine the actual ownership of the site. Rodriguez avers that he has never learned who the actual owner of the site is.

42. In March of 1983 RRAI amended its application to change the proposed city of license. The engineering exhibit was not amended and the transmitter site remained as initially proposed because RRAI principals believed that the Cerro Guaniquilla site was available.

43. Subsequently, after rethinking the city of license question a further amendment was filed in July of 1983 withdrawing the amendment of March 1983 which at that point had not been acted upon by the Commission.

44. Rodriguez alleges that in the process of these developments RRAI was advised by its consulting engineers to find a better site in terms of area and population coverage. This advice coupled with the uncertainty of ownership of the Cerro Guaniquilla site convinced Rodriguez to secure a new site. The site change amendment was filed in August of 1983 but RRAI did not address any loss of site because it continued to believe that the site Cerro Guaniquilla would be available.

45. Rodriguez' testimony is trustworthy of belief. The record offers ample evidence in support of it. Rodriguez activity immediately after January 10, 1983 indicates that he doubted the accuracy of Blanco's statement. Rodriguez continued his search to determine who the actual owner of his proposed site was. The land records were not up to date, in fact five years behind in sequence and there is no evidence that Blanco stated what was the basis for his assertions. In light of this fact it was prudent for Rodriguez to continue his search. RRAI did not begin to look for a new site until June of 1983, a fact which lends credence to Rodriguez' assertion that at the time of RRAI's March, 1983 amendment Rodriguez believed that the Cerro Guaniquilla site was available. The search for a new site was undertaken because of the advice received from consulting engineers and the uncertainty of the ownership of the then proposed site. There is no evidence that RRAI received any information regarding the initial proposed site other than what it had in June of 1983. In fact a competing applicant F.M. Minority Broadcasting filed its application on April 20, 1983 specifying the Cerro Guaniquilla site and Ortiz refiled its application on July 22, 1983, again specifying Cerro Guaniquilla site.

46. A subsequent event tends to justify Rodriguez' decision to doubt Blanco's judgment. Ortiz, in amending its application to specify another transmitter site in October of 1985, reported that the land, assumed to be owned by one private individual, was in fact owned by one Mr. Ramirez, and that he had sold it a few months before July 30, 1985 and that it would not be available. See, the Ortiz' Petition for Leave To Amend, filed October 18, 1985 (official notice taken). The agency Blanco worked for did not own the land of the proposed site.

47. Finally there is no evidence of any motive to conceal. Applicant RRAI points out that the entire premise on which this issue was added is flawed. The period of time, the first six months of 1983, in which the misrepresentations were alleged to have occurred, was a time in which RRAI could have amended (and did amend) as a matter of right. If RRAI had believed that its site was lost, it could have reported that fact with no adverse consequences whatsoever, while seeking a new site. It could then have amended again when it found a new site. It had no motive to conceal any loss of a transmitter site, nor any conceivable intention to mislead the Commission. It would gain nothing therefrom. Misrepresentation and lack of candor both require the element of willfulness. See, *e.g., Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 130 (1983). Even carelessness and slipshoddiness are insufficient, because they lack the necessary element of intent. *John C. Roach*, 43 FCC 2d 685, 689 (Rev. Bd. 1973). Carelessness and a mistake of law are entirely different matters from an intent to deceive. *Gary D. Terrell*, 59 RR 2d 1452, 1454 (Rev. Bd. 1985). In light of the foregoing, the transmitter site - misrepresentation issue specified against RRAI IS RESOLVED in its favor.

Abuse of Process - Impersonating an FCC Employee - RRAI

48. Three persons offered testimony on this issue. Ortiz Postigo maintains that Maldonado on his return visit to Postigo's photo store represented himself as being an FCC employee. Maldonado denies ever making such representation. Maldonado is supported by Juan Esquerdo who accompanied him on his visit to Postigo's photo store. Because Postigo is inconsistent in his testimony, it is deemed his testimony on this issue is not trustworthy of belief.

49. The record indicates that Postigo does not recall the words that Maldonado used on the second visit. Although Postigo averred in his two declarations that Maldonado "stated that he was from the FCC", and that Maldonado "represented that he was an FCC employee", at deposition Postigo testified that the term "employee" was never used. He also denied using the term when he gave testimony at the hearing. At deposition Postigo stated that he didn't recall the words used by Maldonado, but that it was something about the FCC. Maldonado testified that at the time of the second visit to the photo store he explained about the case at the FCC and that he needed photographs to demonstrate facts about the radio station. In this he was corroborated by Esquerdo. It is easy to see how Postigo could have been confused.

50. Additionally, Postigo stated in a declaration that he was unfamiliar with the singing group "Los Andinos" of which Maldonado is a singer but at hearing Postigo stated that he did know of the group.

51. Postigo also asserted that on his return visit Maldonado only wanted to ask questions about Radio Stations WEKO and WMIO but he refused to engage in the inquiry because Maldonado could not produce any identification. As RRAI points out, it strains credulity that Maldonado should return to see Postigo and solely ask questions about the radio stations when he did not know whether Postigo had any connection with the radio stations.

52. Postigo had a motive to help Ortiz' case. He is a cousin of David Ortiz and has advertized on WEKO.

53. Maldonado was straight forward in his testimony. There was no need for him to impersonate an FCC employee because, as he said at the time, no permission was necessary to take a picture from public property. Esquerdo corroborated Maldonado's testimony. Esquerdo accompa-

nied Maldonado to Cabo Rojo to witness the events. He had no connection with RRAI except that he was Maldonado's friend. It is very likely that Esquerdo accompanied Maldonado on the return visit to the photo store since he went to Cabo Rojo in the first place to act as witness.

54. In light of the foregoing the abuse of process issue specified against RRAI IS RESOLVED in its favor. Maldonado and Esquerdo's testimonies are credible. Viewing Postigo's testimony as a whole, it is clear that Postigo is not certain of the facts. It is deemed that his recollection was affected by his desire to help his relative David Ortiz.

Job Offer - Ortiz

55. Jorge Morales Gonzague (Morales) testified that David Ortiz offered him a job at WMIO(FM). For a number of reasons, his testimony is entirely credible.

56. Morales' testimony in this proceeding comes as the result of a chance meeting between him and Maldonado. In 1988 Morales worked as a communications officer for Senator Soto. In March of 1988 he visited station WEKO(AM) to obtain the tape of a speech by Governor Colon wherein Governor Colon allegedly either endorsed or spoke favorably of Senator Soto's candidacy for re-election. Upon arriving at the station he received the tape in question and spoke with David Ortiz. The conversation covered broadcasting and Morales' experience with it. Morales' experience was extensive and he had known David Ortiz was connected with Notiuno Network. Morales indicated that he would be interested in doing broadcast work. After the visit, on April 18, 1988, David Ortiz by phone offered Morales a job at Station WMIO, 102.3. Morales accepted the offer and agreed to return to the station on April 25 or 26 to conclude the details. In the meantime, however, he met by chance Maldonado. The two conversed over lunch. Morales told Maldonado about Ortiz's job offer. He was certain that the offer was for Station WMIO, broadcasting at 102.3. Maldonado told him that WMIO is not owned by David Ortiz. Morales did not keep the appointment with Ortiz having decided to continue to work for Senator Soto.

57. Having learned that RRAI reported the job offer in an FCC pleading, Ortiz hired a detective Manuel Feliciano to visit Morales. Feliciano visited Morales on May 9, 1988. Feliciano stated that his visit concerned a conflict over some radio stations in Cabo Rojo and that he was making the approach because the person he represented "didn't care for money." Feliciano stated that he could not say whom he represented. An appointment set for the next day was not kept by Feliciano.

58. Ortiz denied ever seeing Morales before the one instance in March of 1988 and that he ever worked for Network Notiuno. However at hearing he admitted that his station WEKO was Network Notiuno affiliate for 14 years. He admitted hiring Feliciano but stated that he did so to find what kind of person Morales was because he was scared of Morales as a result of Morales' visit to his station. This allegation is simply incredible. Feliciano was hired two months after Morales visited the WEKO station. Ortiz states that the only report he received from Feliciano was that Morales was hard to find, but Ortiz already knew where Morales had worked at the time. All along David Ortiz denied that the tape that Morales allegedly sought did not exist and that no speech by Governor Colon was aired in February of 1988. Testimony on rebuttal proved otherwise. The record shows that David Ortiz knew or should have known that his and his son's representations were false because he signed and double-checked the forms reporting the billings for political broadcasts of which there were only two in the month of February 1988 to the Elections Committee of Puerto Rico.

59. It is concluded that neither David Ortiz' nor his son Wilkins' testimony is credible; that they have indeed misrepresented facts to the Commission concerning events which transpired between Morales and Ortiz; and that Morales' testimony is credible and is fully credited. It is concluded that David Ortiz did in fact offer a job to Jorge Morales at WMIO, and that David Ortiz did in fact misrepresent facts to the Commission, and submitted false testimony in this proceeding concerning material issues. Accordingly, it is found that issues 3 and 5 ARE RESOLVED against David Ortiz Radio Corporation and that Ortiz is therefore not basically qualified to hold the license of the facilities sought herein.

Ultimate Conclusion

60. It is concluded that Ramon Rodriguez and Associates, Inc. is basically qualified, Issues 1, 2 and 4 having been resolved in its favor. Issues 3 and 5 have been resolved against David Ortiz Radio; Ortiz is not basically qualified to hold the license of the facilities sought herein.

Accordingly, IT IS ORDERED that unless an appeal from this Supplemental Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the applica-

tion of Ramon Rodriguez and Associates, Inc. IS GRANTED,[1] and the application of David Ortiz Radio Corporation IS DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

[1] The construction permit has already been issued to RRAI on February 12, 1991 (see Daily Release Report No. 21051, at page 7, released February 12, 1991). Since that date, RRAI filed an application requesting extension of the construction permit on the basis of the pendency of local authorization. The application was accepted for filing (see Report No. 15330, released August 17, 1992, at page 9). The application was unopposed and granted.

In a pleading filed December 24, 1992 with the Commission and entitled "Emergency Petition for Rescission of Construction Permit," Ortiz sought to have the construction permit rescinded. The petition has been opposed by RRAI and to date no decision has been reached on it.

In the "Petition to Enlarge," filed January 19, 1993, Ortiz seeks that character issues be specified against RRAI regarding RRAI's premature construction of facilities, lack of candor to the FCC in RRAI's August 4, 1992 Application for Extension of Construction Permit (FCC Form 307) and RRAI's *ex parte* contact with the Commission staff (failure to serve the application (Form 307) on the parties to the proceeding).

Ortiz argues that by action taken August 20, 1991, the U.S. Court of Appeals reversed the July 6, 1990 Order of the Commission granting the construction permit to RRAI and remanded the case for further proceeding. Ortiz notes further that in a pleading filed May 29, 1992, "Motion to Strike," it argued that RRAI because of the remand does not have the construction permit it claimed to have in its "Opposition to Appeal of Denial of Motion to Stay," filed May 28, 1992. According to Ortiz its and RRAI's assertions were not addressed in the Orders addressing the pleading.

Ortiz notes that RRAI filed for an extension of the construction permit, but failed to serve a copy either to Ortiz or its counsel, or for that matter to the Administrative Law Judge or the Hearing Branch.

Ortiz argues that on September 22, 1992, the Commission's staff apparently without knowledge of the ongoing hearing proceeding granted RRAI's application for extension of the construction permit and set a March 23, 1993 date for required completion of construction. Ortiz complains that in the remand hearing held September 22, 1992 and September 23, 1992 counsel for RRAI made no mention of the application extension. Ortiz states that it first learned of RRAI's extension application and start up construction by RRAI's mention of it in its "Proposed Findings of Fact and Conclusion of Law," filed January 5, 1993.

Ortiz charges that RRAI's start up construction directly confronts the Commission policy against premature construction and that its cover of a "Modification of Construction Permit" is untenable. Ortiz maintains that had RRAI advised the Commission's staff of the Court of Appeals reversal and remand no construction permit extension would have been issued and that its *ex parte* communication with the Commission's staff was in violation of Sections 1.1202 and 1.1208 of the Commission's rules.

The requested issues will not be specified. They are not warranted either on procedural or substantive grounds.

Ortiz has not advanced its petition timely. RRAI informed Ortiz at least as early as December 15, 1992 when it filed its Proposed Findings that it was issued the construction permit and was in the process of constructing the station. (*See* RRAI Proposed Finding, page 2, footnote 4.) Commission's Rule 1.229(b)(3) requires that motion for modifications of issues be filed within 15 days after such facts are discovered by the moving party.

RRAI was issued a construction permit on February 12, 1991 and public notice was issued. No reconsideration of the order was sought until Ortiz filed its extant Emergency Petition for Rescission on December 24, 1992. Whether the construction permit was properly issued or not is not a reflection on RRAI. It was proper for RRAI to act on it albeit to do so was at its own peril, considering the outstanding remanded issues. The RRAI application for extension was placed on public notice. This action was not relevant to any issue in the case. RRAI had no obligation to inform the staff of the ongoing nature of the proceeding. Besides Ortiz notified the staff of the remand by his "Motion to Strike," filed May 29, 1992. In any event no harm was done to anyone. RRAI may not broadcast without an operating permit. There was no intent to conceal anything in this proceeding. The requested character issues and Sections 1.1202 and 1.1208 (*ex parte* communication) issues are not warranted. Neither are any sanctions warranted against Ortiz. The Ortiz' filings are not frivolous and have caused no delays.

In light of the foregoing, the Ortiz "Petition to Enlarge," filed January 19, 1993 and RRAI's "Request for Imposition of Sanctions," filed January 28, 1993 ARE DENIED.

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 94 of the
Commission's Rules to Implement
Technical Criteria for Licensing,
of Multiple Address System (MAS)
Stations

ORDER

Adopted: March 31, 1993; Released: April 7, 1993

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. In this Order we consider a joint Petition for Rule Making filed on May 7, 1990 by the American Petroleum Institute (API) and the Special Industrial Radio Association, Inc. (SIRSA).[1] API and SIRSA (Petitioners) propose amendment of Section 94.63(d)(4)(iii) of the Commission's Rules, 47 C.F.R. § 94.63(d)(4)(iii), to permit more expeditious licensing of multiple address systems (MAS) that fail to meet the minimum spacing requirements of paragraphs (d)(4)(i) and (d)(4)(ii) of this Rule. 47 C.F.R. §§ 94.63(d)(4)(i) and (d)(4)(ii). The Petitioners also propose addition of a Section 94.63(d)(4)(iv) to create temporary developmental authorizations for short-spaced MAS facilities.

II. BACKGROUND

2. Sections 94.63(d)(4)(i) and 94.63(d)(4)(ii) require applicants for MAS facilities to meet minimum spacing separations between co-channel fixed master stations.[2] Currently, if an applicant for a multiple address system cannot meet the applicable spacing criteria, it can submit an application pursuant to Section 94.63(d)(4)(iii), which requires an engineering analysis demonstrating that the proposed facility has been coordinated with existing systems to which the proposal will be short-spaced. This analysis must include a complete showing of how the interference study was performed, including system parameters, nominal and modified service areas, propagation models, and special terrain features, as well as a statement that all affected parties have reviewed the engineering analysis and agree to accept any calculated levels of interference.

3. The Petitioners propose to modify Section 94.63(d)(4)(iii) to allow MAS applicants that fail to meet the required spacing separations to apply for a short-spaced facility without obtaining the consent of all affected parties. If an agreement with existing licensees can not be obtained, the Petitioners propose that an applicant applying pursuant to this section would be required to perform a very specific and detailed engineering analysis. If this analysis showed that established interference criteria would not be exceeded, the applicant would be authorized to construct a short-spaced facility. The Petitioners claim that many potential MAS applicants have attempted to secure short-spacing agreements and that it has generally been very difficult to obtain the consent of all affected parties. The Petitioners also claim that this consent provision has, in effect, given existing licensees veto power of new short-spaced stations, contributing to a shortage of MAS spectrum. In view of these considerations, the Petitioners believe that the Commission should provide MAS applicants a method of obtaining a short-spaced facility based solely on technical merit and not require the consent of affected parties.

III. DISCUSSION

4. Our rules try to balance the interests of all concerned parties and establish regulations that will satisfy the needs of as many applicants as possible without being overly burdensome. The minimum spacing requirements of Section 94.63 were established to facilitate coordination efforts and allow expeditious approval of MAS facilities. This has proven effective in the majority of cases. In setting the minimum spacings, however, the Commission also recognized that sometimes it may be difficult or impossible to meet these requirements. Section 94.63(d)(4)(iii) thus provides a method for applicants to obtain short-spaced MAS facilities. This provision requires an engineering analysis as well as the consent of all affected parties.

5. The Petitioners assert that many attempts to obtain the required short-spaced agreements have been unsuccessful and have proven to be a substantial burden on applicants. A review of our records indicates, however, that, to date, only a few waivers of the consent requirement have been submitted. This may indicate that, in most instances where the consent of affected parties could not be obtained, it may not have been possible to justify waiver of our spacing requirements through a technical showing. If it had been possible for an applicant to demonstrate that adequate protection would be afforded any affected stations, we would have expected applicants to pursue authorizations through waiver. Furthermore, other than in the petition, we have had very few concerns expressed about this process of obtaining short-spacing.

6. The instant petition is an effort by MAS users to implement standardized protection requirements and interference calculation methods for MAS facilities that do not meet the minimum spacing requirements. This standardized format would be used in place of a waiver request in instances where the consent of affected licensees can not be obtained. We fully support and recognize such voluntary industry standards. Interference protection requirements have, however, already been established by the

[1] Since the filing of its petition, SIRSA has formally changed its name to Industrial Telecommunications Association (ITA).

[2] In the 928-929/952-960 MHz range the required minimum spacing is 145 km (90 miles). In the 932-932.5/941.5 MHz range the minimum spacing is 113 km (70 miles). Section 94.63 (d)(4)(i) also establishes minimum spacing separations between fixed-to-mobile and mobile-to-mobile systems. The instant petition, however, does not propose to alter the rules regulating these systems.

Commission[3] and we believe that calculation methods other than the petitioner's may be just as accurate at establishing protection to existing facilities. Currently, Section 94.63(d)(4)(iii) allows applicants to submit a technical showing that can take into account any variety of circumstances and terrain conditions to justify waiver of our minimum spacing rules. Applicants are not limited to any one specific technical exhibit.[4] The proposed methodology appears to be well founded and derived applying good engineering practices, and an applicant applying this method could be reasonably assured that a waiver would be granted. As observed, however, our current rules would allow applicants to use the proposed formula or some other formula to demonstrate that existing facilities are protected to a level at least as great as that used to determine the minimum spacings. While the industry efforts for standardization will be a valuable aid for determining the viability and acceptability of proposed short-spaced MAS facilities, protection for MAS stations should be based primarily on the established mileage separation, and alternatively on a case-by-case waiver basis. We are reluctant, therefore, to adopt a proposal that imposes such strict requirements on applicants proposing short-spaced stations when these applicants have greater flexibility under our existing rules through the use of a waiver request.

7. Additionally, the Petitioner contends that providing for short-spaced grants without the need for waiver of the consent requirement of 47 C.F.R. § 94.63(d)(4)(iii)(D) would save time and resources for both applicants and the Commission. Our experience has been that only a limited number of short-spaced applications requesting waiver of this Section are received by the Commission and thus, there has been a minimal impact. We are also not convinced that adoption of the instant proposal would represent a substantial savings in time for either the applicant or the Commission. Whether an application is prepared as proposed in this petition or a waiver of 47 C.F.R. § 94.63(d)(4)(iii)(D) is requested, an extensive engineering analysis must be performed by the applicant and reviewed by the Commission.

8. In conclusion, we find that the Petitioners' proposal has merit and will be a valuable aid in establishing voluntary industry guidelines for applicants seeking waiver of our rules. We believe, however, that to incorporate the instant proposal into our Rules would unduly limit the options currently available to applicants seeking short-spaced MAS authorizations.

IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, pursuant to 47 C.F.R. §§ 1.401 and 1.407 of the Commission's Rules, that the Joint Petition for Rule Making filed on May 7, 1990 by the American Petroleum Institute and the Special Industrial Radio Service Association, Inc. is DISMISSED without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

[3] *See* the Memorandum Opinion and Order in PR Docket No. 87-5 at paragraph 6, 4 FCC Rcd 2491, 2492 (1989). There the standard separation distances were calculated using a 20 dB carrier-to-interference (C/I) ratio at the edge of a station's service area. Although this C/I ratio is not stated specifically in our Rules, it is reasonable that an applicant meeting this threshold could expect a waiver of our minimum spacing requirements to be granted.

[4] For example, the Petition specifies use of National Bureau of Standards Tech. Note 101. Currently, applicants are free to use any method they feel applicable to calculate signal propagation.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-96

In re Applications of

ADAM D. GEARHEART File No. BPH-920102MC
(hereafter "Gearheart")

ROBERT G. PICKLESIMER File No. BPH-920109MB

For Construction Permit for a
New FM Station on Channel 285A
in Harold, Kentucky

HEARING DESIGNATION ORDER

Adopted: March 23, 1993; Released: April 7, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Gearheart has filed such statement, it is deficient. Gearheart has not listed a women's organization as a recruitment source. Accordingly, Gearheart will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Gearheart shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

7. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-44

In re Applications of

RURAL INITIATIVES FOR SHELTER AND EDUCATION (hereafter "Rural") File No. BPED-870817MC

AMERICAN INDIAN BROADCAST GROUP, INC. (hereafter "Group") File No. BPH-870820MB

For Construction Permit
for a New FM Station on Channel 279A
(103.7 MHz) in Hartford, Michigan

HEARING DESIGNATION ORDER

Adopted: March 17, 1993; Released: April 7, 1993

1. The Commmission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matter.* The hearing designation order released in this proceeding on March 8, 1993, is hereby set aside. This action is taken pursuant to 47 C.F.R. § 1.113(a).

3. *Rural.* Rural proposes a tower site 161.8 kilometers from the licensed site of FM Station WEZW, Channel 279B, Wauwatosa, Wisconsin. Pursuant to Section 73.207 of the Commission's Rules, Rural's site must be at least 163 kilometers from WEZW's. Thus, Rural's proposal is short-spaced by approximately 1.2 kilometers. In light thereof, Rural requests a waiver of the rule. In support of its request, Rural asserts that a grant would permit noncommercial operations on an existing tower, thereby saving the nonprofit applicant "substantial" sums which would otherwise be expended on construction and land acquisition. According to Rural, the public interest would benefit if it were able to devote these savings to enhanced programming. Further, Rural asserts that the resultant overlap between its 34 dbu contour and WEZW's 54 dbu contour would occur entirely over Lake Michigan, and, accordingly, the policy underlying the separation standards would not be undercut.

4. The Commission determined that the minimum mileage separation standards, as embodied in the table of frequency allotments set forth in 47 C.F.R. 73.207, offered the best means for achieving an orderly, efficient, and effective development of the commercial FM broadcast service. *First Report and Order in Docket 14185,* 33 FCC 309 (1962). An applicant requesting a waiver of the separation standards must first demonstrate that other, conforming, sites are unavailable. It must also demonstrate that a grant would further the public interest. *Townsend Broadcasting Corp.,* 62 FCC 2d 511 (1976). The threshold showing, however, is not necessary where the proposed short-spacing is *de minimis,* or no more than one mile. *See Baltimore Radio Show, Inc.,* 5 FCC Rcd 3712 (1990). Insofar as Rural proposes a mere 1.2-kilometer short-spacing, the *de minimis* criterion is satisfied, and the need for the threshold showing is obviated. *See, e.g., Kenter Broadcasting Company,* 62 RR 2d 1573, 1577 n.9 (1986), *affirmed,* 816 F. 2d 8 (D.C. Cir. 1987)(*per curiam*).

5. The Commission has recognized benefits to the public interest arising out of short-spaced proposals, such as the avoidance of environmental questions. 5 FCC Rcd 3712. It has also noted the public interest benefits of co-locating transmission facilities. *Beasley Broadcasting of Philadelphia, Inc. (WXTU),* 100 FCC 2d 106 (1985).[1] Here, as in *Beasley,* an evaluation of all relevant factors tilts the balance in favor of a grant of the requested waiver, and it will be granted below.

6. Section II, Item 7 of the FCC Form 340 (May 1985) filed by Rural asks whether documents, instruments, agreements or understandings for the pledge of stock of a corporate applicant, as security for loans or contractual performance, provide that: (a) voting rights will remain with the applicant, even in the event of default on the obligation; (b) in the event of default, there will be either a private or public sale of the stock; and (c) prior to the exercise of stockholder rights by the purchaser at such sale, the prior consent of the Commission will be obtained. A negative response requires attachment of an Exhibit providing a full explanation. Rural answered Item 7 in the negative, but failed to provide the requisite explanation. Accordingly, it will be required to do so below.

7. Rural's application contains a discrepancy between the tower height above ground level ("AGL") listed in Section V-B, Item 9 and the value on file with the Commission for the tower proposed by Rural for its antenna, that of WCSY-FM, South Haven, Michigan. Specifically, in Section V-B, Item 9, Rural specified the tower height AGL as 316 meters. However, according to the Commission's records, the tower height AGL of the WEZW tower is 100 meters and the tower height above mean sea level ("AMSL") is 316 meters. We note that the application's tower sketch, submitted as Engineering Exhibit E-3, lists the tower heights as 100 meters AGL and 316 meters AMSL. Since the application specifies an existing tower for which data are on file with the Commission, this discrepancy constitutes neither an acceptability nor a tenderability defect and may be corrected by an amendment. Rural will be directed to file such an amendment below. Furthermore, because the discrepancy concerns tower height AGL, an air hazard issue will be designated against Rural in this Order. Should Rural timely file a corrective amendment, the Judge may dismiss the issue.

8. *Group.* Pursuant to 47 C.F.R. § 1.65 requires that applicants maintain the continuing accuracy and completeness of their proposals with respect to all matters which

[1] In *Beasley,* the Commission discussed the benefits of *de facto* antenna farms. Although Rural does not mention an antenna farm, the benefits to the public of co-locating on an existing tower appear similar.

may be of decisional significance. Group filed several amendments detailing the status of its other media interests, the latest being filed on July 18, 1990. However, dispositive action has since been taken on several of Group's then-pending proposals. For example, its application for a new FM station in San Angelo, Texas, (File No. BPH-870921MB) was granted on January 25, 1991, and its application for a new FM station in Vero Beach, Florida (File No. BPH-880523MF) was dismissed on January 2, 1991. Accordingly, Group will be required to file an amendment listing its current media interests.

9. As stated previously, Rural proposes to sidemount its antenna on the existing tower of station WCSY-FM, South Haven, Michigan. Group proposes to construct a new tower. Our engineering study indicates that both proposals may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that the applicants may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Specifically, Rural has not indicated how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, and Group has not submitted the requisite agreement among WEZW tower users with respect to how such workers will be protected. Accordingly, both applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally*, OST Bulletin No. 65, (October 1985) entitled "Evaluation Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," at 28. Accordingly, both applicants will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

10. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Group	April 28, 1988; July 11, 1988; October 27, 1988; February 17, 1989; June 1, 1989; August 8, 1989; September 7, 1989; October 27, 1989; April 13, 1990; July 18, 1990.

11. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Group would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Rural and Group in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Rural and Group would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That Rural's request for waiver of 47 C.F.R. § 73.207 IS GRANTED.

15. IT IS FURTHER ORDERED, That Rural shall file amendments providing the requisite explanation for its negative response to Section II, Item 7, FCC 340 (May 1985) and correcting the discrepancy in tower height above ground level with the presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That Group shall submit an amendment which details each of its media interests with the presiding Administrative Law Judge within 30 days after the release of this Order.

17. IT IS FURTHER ORDERED, That the applicants shall file the environmental information specified in Paragraph 9 above with the presiding Administrative Law Judge within 30 days of the release of this Order.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Group ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

19. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

20. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20054. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20054.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties which have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (*see* Section 1.325(c)(1) of the Rules; and (b) the Standardized integration Statement (see Section 1.325(c) of the Rules), which must also be filed with the presiding officer. Failure to serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 168 (1990), *erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-75

In re Applications of

TRINITY BROADCASTING OF FLORIDA, INC. File No. BRCT-911001LY
For Renewal of License of
Station WHFT(TV), Miami, Florida

and

GLENDALE BROADCASTING COMPANY File No. BPCT-911227KE
For Construction Permit
Miami, Florida

HEARING DESIGNATION ORDER

Adopted: March 16, 1993; Released: April 7, 1993

By the Commission: Commissioner Marshall not participating.

1. The Commission has before it the above-captioned application for the renewal of license of station WHFT(TV), Channel 45, Miami, Florida, filed by Trinity Broadcasting of Florida, Inc. ("TBF"), and the mutually exclusive application of Glendale Broadcasting Company ("Glendale") for a new commercial television station to operate on Channel 45, Miami, Florida.

2. Also before the Commission are the following pleadings: (a) Petition to Deny TBF's renewal application filed by Glendale; (b) Petition to Deny TBF's renewal application filed by Spanish American League Against Discrimination ("SALAD"); (c) Opposition to Petitions to Deny filed by TBF; (d) Reply to Consolidated Opposition to Petitions to Deny filed by Glendale; (e) Request for Declaratory Ruling of National Minority TV, Inc. ("NMTV"); (f) Opposition to Request for Declaratory Ruling filed by Glendale; (g) Response to the Commission's Letter of Inquiry filed by NMTV; and (h) Comments on NMTV's Response to the Commission's Letter of Inquiry filed by Glendale.

I. BACKGROUND

3. On December 27, 1991, Glendale filed a Petition to Deny the license renewal application of TBF. While Glendale's pleading is styled as a "Petition to Deny" it actually seeks the specification of numerous issues against TBF. The thrust of Glendale's Petition is that Paul F. Crouch and/or Trinity Christian Center of Santa Ana, Inc. d/b/a Trinity Broadcasting Network ("TBN") have used NMTV as a front to evade the Commission's multiple ownership rules.

4. TBN is a non-stock corporation. Paul F. Crouch, his wife, Janice Crouch, and Norman G. Juggert are TBN's directors.[1] These three are also the directors of other TBN affiliates[2] which, with TBN, are the licensees of 11 full-power commercial television stations.[3] Paul Crouch, P. Jane Duff, Phillip Aguilar and E.V. Hill[4] are the directors of NMTV, the licensee of KNMT-TV, Portland, Oregon. At one time, TBN and its affiliates were the licensees of 12 commercial television stations, and NMTV was the licensee of two commercial television stations.[5] Paul Crouch, a non-minority, is the president of TBN and its affiliates as well as president of NMTV. Duff, a minority, is assistant to the president of TBN and secretary/treasurer of NMTV (she was formerly vice president of NMTV).[6] Paul Crouch and Jane Duff are salaried employees of TBN. Aguilar, a minority, is the vice president of NMTV and the founder and pastor of Set Free Christian Fellowship, a church in Anaheim, California. Hill, a minority, is the pastor of the Ebenezer Baptist Church in Watts, California.

5. On March 29, 1991, NMTV filed an application to acquire the license of WTGI(TV), Wilmington, Delaware. A petition to deny the assignment application was filed which alleged that NMTV was a front for TBN. After NMTV filed its Opposition, the Chief of the Mass Media Bureau's Video Services Division requested additional information from NMTV. After NMTV responded, but before the Commission could act on the assignment application, it was withdrawn by NMTV. Glendale seeks to raise the same matters that were alleged in connection with the

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[1] In a non-stock corporation the Commission normally looks to directors in evaluating ownership and control. *Roanoke Christian Broadcasting, Inc.*, 52 RR 2d 1725 (Rev. Bd. 1983).

[2] The term "TBN affiliates" is used herein to refer to the broadcast licensees that have the same directors, Paul F. Crouch, Janice Crouch, and Norman G. Juggert, as TBN. Although they are set up as separate legal entities, they are all controlled by the same individuals.

[3] TBN: KTBN-TV, Santa Ana, California; WDLI(TV), Canton, Ohio; and WHSG(TV), Monroe, Georgia. Trinity Broadcasting of Arizona, Inc., KPAZ-TV, Phoenix, Arizona. Trinity Broadcasting of Oklahoma City, Inc., KTBO-TV, Oklahoma City, Oklahoma. Trinity Broadcasting of Washington, Inc., KTBW-TV, Tacoma, Washington. Trinity Broadcasting of Florida, Inc., WHFT(TV), Miami, Florida. Trinity Broadcasting of Indiana, Inc., WKOI(TV), Richmond, Indiana; and WCLJ(TV), Bloomington, Indiana. Trinity Broadcasting of New York, Inc., WTBY-TV, Poughkeepsie, New York. Trinity Broadcasting of Texas, Inc., KDTX-TV, Dallas, Texas.

[4] From September 1980 until August 1990, Phillip David Espinoza, a minority, was a director of NMTV along with Crouch and Duff. Aguilar replaced Espinoza as a director in August 1990. Hill became the fourth director in October 1991.

[5] TBN and its affiliates reached the 12 television station limit in 1986 with the purchase of WCLJ(TV), Bloomington, Indiana. NMTV acquired its first commercial television station, KMLM-TV, in June 1987, allegedly putting TBN over the multiple ownership limit with 13 television stations. In December 1988, NMTV acquired KNMT-TV raising TBN's alleged interests to 14 television stations. In December 1989, KNAT-TV, Albuquerque, New Mexico, was sold and WHSG(TV), Monroe, Georgia, was acquired, thus keeping TBN's alleged interests at 14 television stations. In April 1991, KMLM-TV was sold by NMTV and in December 1991, WLXI(TV) was sold by TBN. Thus, TBN was allegedly in violation of the Commission's multiple ownership rules from June 1987 until December 1991.

[6] Prior to becoming a director of NMTV in 1980, Duff was vice president and a director of TBN.

WTGI(TV) assignment application. Indeed, Glendale resubmits many of the pleadings and attachments previously filed in connection with the proposed sale of WTGI(TV). NMTV has also filed a Request for Declaratory Ruling concerning its relationship to TBN. Consequently, the staff sought additional information from NMTV through a Letter of Inquiry. All of the responsive information and pleadings are being considered herein because they all relate to the issue of who controls NMTV.

II. NMTV'S REQUEST FOR DECLARATORY RULING

A. Proposal

6. NMTV's Request for Declaratory Ruling, filed November 18, 1991, seeks a declaration from the Commission that "the 'minority-owned' standard set forth in rule 73.3555[e][7] is met by a nonprofit organization when a controlling number of its voting board members are individuals from recognized minority groups, and when the nonprofit organization is in compliance with state law regarding its chartering and operations, without resorting to consideration of other factors such as whether the minority directors are involved in day-to-day station operation." NMTV also seeks a declaration whether a minority-controlled corporation is prohibited from receiving assistance from or associating with a nonminority-controlled corporation in various enumerated ways.[8] Because the issues raised in NMTV's Request forDeclaratory Ruling are so closely related to the issues raised in the Petitions to Deny the renewal application of TBF, they will be addressed herein.

7. NMTV states that it is a California Nonprofit Corporation organized on September 16, 1980, and authorized to do business in Texas, Oregon and Delaware. It is recognized as a tax-exempt 501(c)(3) organization by the IRS, and is tax-exempt in California, Texas and Oregon. NMTV states that all of its assets are irrevocably dedicated for charitable purposes.

8. NMTV further states that its organizational documents provide that the corporation's directors are its members, are self-perpetuating, and that each has one vote. From its inception until October 1991, two of NMTV's three directors have been minorities. In October 1991, a third minority director (Hill) was added to bring the current number of NMTV directors to four.

9. NMTV notes that the Commission has twice approved its acquisition of television stations pursuant to the provisions of Section 73.3555(e) of the Commission's Rules. NMTV contends that the Commission reviewed its legal qualifications, organization, purpose, and association with TBN in both cases. Moreover, NMTV has provided additional information on several occasions when requested by the Commission's staff. NMTV claims that the staff's apparent unwillingness to grant the application to acquire WTGI(TV), Wilmington, Delaware, has created uncertainty as to whether the Commission's application of the provisions of Section 73.3555(e) has changed.

10. NMTV contends that it is minority-owned because a majority of its directors are members of minority groups. Moreover, it asserts that it is minority-controlled for purposes of Section 73.3555(e) because it meets that rule's definition of minority-controlled by being more than 50 percent owned by one or more members of a minority group. NMTV further contends that the Commission's multiple ownership rules relating to minority ownership do not require integration of ownership into management and do not mention minority programming.

11. NMTV claims that minority ownership, under the Commission's multiple ownership rules, is an end in itself. According to NMTV, the Commission established a different standard for determining minority-control under the multiple ownership rules than it established for use in connection with the integration criteria of the standard comparative issue, and for tax certificate and distress sale policies. NMTV concedes that, in connection with the standard comparative issue, minority ownership is significant only when it is combined with integration of the minority owner into the management of the broadcast station. NMTV also concedes that in adopting the minority distress sale and tax certificate policies the Commission was striving to increase minority ownership and operation of stations. These policies, NMTV notes, were designed to increase minority management, minority programming and diversity of broadcast voices. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978). However, NMTV argues that when the Commission adopted the minority ownership provisions of the multiple ownership rules, no reference was made to management involvement by minorities or to minority programming. Accordingly, NMTV concludes that the Commission should not look beyond mere legal ownership of a licensee in order to determine where control lies.

12. NMTV acknowledges the longstanding and extensive ties with TBN which are discussed herein in connection with the Petitions to Deny. Nevertheless, NMTV contends that, because it maintains a separate corporate and legal existence from TBN, complies with federal and state laws, and functions as a separate corporation, it satisfies the Commission's multiple ownership requirements. NMTV also argues that its history of constructing and operating television stations indicates that its continued operation is in the public interest.

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[7] The Commission recently amended Section 73.3555 of its Rules which caused a renumbering of the subsections. *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387 (1992). Thus, former Section 73.3555(d) has now become Section 73.3555(e). References herein will be to the new subsection numbers.

[8] NMTV queries whether the following activities are prohibited between a minority-controlled corporation and a nonminority-controlled corporation pursuant to Section 73.3555(e) of the Commission's Rules:

(a) entering into a program affiliation agreement;

(b) loaning funds at favorable rates;

(c) sharing common officers;

(d) using common employees;

(e) having salaried employees of the nonminority-controlled corporation as principals of its minority-owned corporation; and,

(f) having substantially similar or even identical benefit plans, personnel practices and other operational similarities.

B. Discussion

13. As discussed *infra*, we will specify a *de facto* control issue in this proceeding. We reject the contention that the minority-control portion of our multiple ownership rules precludes us from looking beyond mere legal ownership of a licensee. *See Arnold L. Chase*, 5 FCC Rcd 1642 (1990). *See also, Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981); *The Trustees of the University of Pennsylvania Radio Station WXPN(FM)*, 69 FCC 2d 1394 (1978). *Cf. Pan Pacific Television, Inc.*, 3 FCC Rcd 6629, 6636 (1988) (Commission looks beyond legal ownership in determining compliance with alien ownership restrictions). As was the case in our review of the first two acquisitions of television stations by NMTV, normally we will seek to determine whether a proposed minority-controlled licensee is in fact a separate legally qualified minority entity. Typically, this review would not entail an inquiry into areas such as involvement in management by minority owners or the broadcast of any particular type of programming. Moreover, when the Commission approved earlier acquisitions of television stations by NMTV, we did not have before us detailed allegations of fact which would indicate that TBN might have *de facto* control of NMTV. However, when a substantial and material question of fact is appropriately raised concerning the *de facto* control of the licensee by another entity, we are not precluded from examining this issue using our established indicia of control. *See, e.g., Stereo Broadcasters, Inc.*, 55 FCC 2d 819 (1985); *George E. Cameron Jr. Communications*, 91 FCC 2d 870 (Rev. Bd. 1983); *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023 (Rev. Bd. 1982). Indeed, for us to refuse to determine where actual control of NMTV lies would be inconsistent with the mandate of Section 310(d) of the Communications Act of 1934, as amended. *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). The types of activities listed in footnote 8, upon which NMTV seeks a declaratory ruling, have been found to be individually acceptable to the Commission in the context of specific factual situations. However, the facts that are before us compel us to consider the whole situation, including the types of activities referenced in footnote 8, in order to determine whether the relationship between TBN and NMTV constitutes *de facto* control.

14. One other matter which we wish to address is NMTV's assertion that under the minority-control provision of our multiple ownership rules, minority ownership is seen as an end in itself. We reject this assertion. Such race based differentiation in the ownership of broadcast stations would not be acceptable if it were not designed to promote goals relating to diversity of programming which we have previously enumerated. *See Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990). "Congress and the Commission have adopted a policy of minority ownership not as an end in itself, but rather as a means of achieving greater programming diversity." *Id.* at 3025.

III. GLENDALE'S PETITION TO DENY

A. Issues Requested

15. Glendale requests that the following issues be specified:

1. To determine whether Trinity Christian Center of Santa Ana, Inc. d/b/a Trinity Broadcasting Network (TBN) and/or Paul F. Crouch exercises *de facto* control over National Minority TV, Inc.

2. To determine whether TBN and/or Paul F. Crouch abused the Commission's processes by using National Minority TV, Inc., as a subterfuge to evade Section 73.3555[e] of the Commission's Rules.

3. To determine whether a grant of the WHFT renewal application would be consistent with Section 73.3555[e] of the Commission's Rules.

4. To determine whether National Minority TV, Inc., falsely claimed minority preferences in LPTV applications filed in its name and whether such false certifications were an abuse of the Commission's processes.

5. To determine whether National Minority TV, Inc., Paul F. Crouch, and/or TBN lacked candor and/or misrepresented facts in an "Opposition to Petition to Deny" filed in the name of National Minority TV, Inc., on May 23, 1991, and/or its September 24, 1991, response to a Commission inquiry.

6. To determine whether National Minority TV, Inc., violated Sections 73.3514 and 1.65 of the Commission's Rules by failing to report the conviction of its director, Phillip R. Aguilar, of felony assault.

7. To determine whether National Minority TV, Inc., and/or Paul F. Crouch misrepresented facts and/or lacked candor concerning Crouch's knowledge of Phillip R. Aguilar's felony conviction.

8. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether TBF, TBN or NMTV is qualified to remain a Commission licensee.

B. The De Facto Control and Multiple Ownership Issues

16. Section 73.3555(e)(1) of the Commission's Rules states that:

> No license for a commercial AM, FM or TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer, or assignment of such license would result in such party or any of its stockholders, partners, members, officers, or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in:
>
> ...
>
> (ii) More than 14 television stations, or
>
> (iii) More than 12 television stations which are not minority-controlled.

Furthermore, Section 73.3555(e)(3)(iii) of the Commission's Rules states that for purposes of this rule, "minority-controlled" means more than 50 percent owned by one or more members of a minority group. As the Commission stated when it adopted its multiple ownership rules, it "permit[s] group owners of television and radio stations to utilize a maximum numerical cap of 14 stations provided that at least two of the stations in which they hold cognizable interests are minority controlled." *Reconsideration of Multiple Ownership Rules*, 100 FCC 2d 74, 94 (1985).

17. Commission precedent establishes that questions as to possible *de facto* control must be decided on a case-by-case basis. *See, e.g., Turner Broadcasting System, Inc.*, 101 FCC 2d 843, 848 (1985). A wide variety of factors may be relevant in reaching a determination. *See generally, William S. Paley*, 1 FCC Rcd 1025 (1986), *recon. denied*, 2 FCC Rcd

2274 (1987), *aff'd sub nom. Fairness In Media v. FCC*, 851 F.2d 1500 (D.C. Cir. 1988)(*mem.*); and *News International, PLC*, 97 FCC 2d 349 (1984). These decisions tend to focus on the ability to control finances, personnel and programming, *News International, PLC*, 97 FCC 2d at 357-8, and, where appropriate, the ability or inability to dominate the company's board of directors. *William S. Paley*, 1 FCC Rcd at 1026. In determining whether a person or entity possesses *de facto* control, "we are governed chiefly by the demonstration of ... power to dominate the management of corporate affairs." *Benjamin L. Dubb*, 16 FCC 274, 289 (1951).

C. Alleged Control Over Board of Directors

18. Glendale contends that NMTV's directors are all closely associated with, and heavily dependent upon TBN. Both Crouch and Duff are employees of TBN. Aguilar's ministry, Set Free, receives from TBN $5,000 per month and the free use of houses and properties in California, Texas and Illinois. Set Free provides services to TBN which include "Prayer Partners," who talk to callers and help in distributing goods donated by TBN viewers. Since its inception in 1980, the other officers of NMTV have been employees of TBN. Currently, employees of TBN, Terrence Hickey and Allan Brown, are assistant secretaries of NMTV. Over the years other officers of NMTV who were also employees of TBN have included: Matthew Crouch, Paul Crouch's son, assistant secretary; Phillip Crouch, Paul Crouch's son, assistant secretary; and Charlene Williams, assistant secretary. Glendale contends that NMTV's dependence on TBN gives TBN the power to control NMTV's minority directors. NMTV's own Response indicates that NMTV's board of directors did not have independent annual meetings from 1981 through 1987, but instead participated in annual meetings of the combined boards of directors of TBN and "affiliated corporations."

19. TBF contends that there are two significant factors that should be kept in mind when analyzing the *de facto* control issue. First, TBF states that both TBN and NMTV are nonmembership, nonprofit corporations in which no individual has an equity or other pecuniary interest. TBF contends that with religious charitable organizations there is often a sharing of volunteers, office space, and financial support. TBF argues that the traditional *de facto* control analysis cannot be blindly applied to entities such as TBN, NMTV and TBF. Second, TBF claims that TBN and NMTV are bound together by their common evangelical mission. TBF states that TBN, NMTV and TBF were all created by:

> their principals because of shared, strongly held common religious beliefs, because of a common commitment to evangelism, and because of a common conviction that their message can best be spread through the use of a television ministry. Actions which might, in a for-profit corporation be indicative of 'control,' are in the culture of religious ministries simply evidence of a shared religious fervor.

TBF also echoes the argument made by NMTV in its Request for Declaratory Ruling, that the minority ownership exception to the Commission's multiple ownership rules should be limited to "ownership" and not take into consideration "control." According to TBF, because the majority of the directors of NMTV have always been minorities, there is no need to determine where control lies.

D. Alleged Control Over Programming

20. Glendale contends that TBN provides NMTV with virtually all of its programming. The programming is provided pursuant to a standard Affiliation Agreement between TBN and NMTV. Glendale contends that the provision of programming by TBN removes the programming from the control of NMTV's minority directors and places it under the control of TBN.

21. In the Response of NMTV to the Commission's Letter of Inquiry ("NMTV Response"), NMTV stated that it produced three programs during 1991. This programming involved crusades or revivals, one of which was put on by TBN. NMTV also claims to produce a weekly show, Joy in the Morning. However, the show is broadcast from TBN's studios on TBN's station KTBN-TV, Santa Ana, California. Moreover, TBN retains significant control over the production and rights to this show. For instance, TBN determines the time and schedule of broadcasts and retains all right, title and interest in all programs.

E. Alleged Control of Finances

22. Glendale asserts that evidence of the control which TBN exercises over NMTV's finances can be found in the loan agreement between TBN and NMTV which was to be used to acquire WTGI(TV), Wilmington, Delaware. Glendale speculates that the terms of the loan were arranged so as to give TBN control over NMTV. Moreover, Glendale claims it is unusual to have a provision in the loan which calls for repayments to be made using 30 percent of the contributions made to TBN from people having zip codes within the WTGI(TV) broadcast area. Glendale also states that in connection with the proposed WTGI(TV) acquisition, Allan Brown, who was not an officer or director of NMTV, but was an officer of TBN, signed checks on behalf of NMTV.

23. The NMTV Response reveals that since at least January 26, 1987, TBN has been authorized and empowered to act as the accounting agent for NMTV. Moreover, TBN currently provides bookkeeping and accounting services to NMTV which include the preparation of NMTV's payroll, financial statements, federal and state income tax returns and reports, purchasing requirements, data processing, and the servicing of NMTV's accounts payable. From 1981 through 1987 NMTV and TBN prepared combined balance sheets and other financial documents. While TBN has advanced or loaned NMTV more than $4 million, no formal notes have ever been executed reflecting the advances/loans. There is also no formal policy for the payback by NMTV of these advances/loans from TBN.

24. TBF claims that NMTV controls its own finances because NMTV generates its own revenue, solicits for its own contributions, files its own tax returns and manages its own bank accounts. TBF also argues that the loan agreement which was proposed to be used with the acquisition of WTGI(TV) is unexceptional and has been used by TBN before.

F. Alleged Control Over Personnel

25. Glendale contends that NMTV has not shown that its minority directors are responsible for making personnel policy decisions at NMTV. Glendale speculates that TBN may have an influence on NMTV's personnel policies because of the sharing of officers and directors.

26. TBF asserts that Duff sets NMTV's personnel policy, and ensures implementation of NMTV's EEO program. Additionally, it claims that Duff prepares and reviews NMTV's filings with the Commission, reviews regular check logs, and approves purchase order expenditures. However, NMTV's Response reveals that NMTV's employee handbook is virtually identical to TBN's employee handbook. Moreover, it appears that some personnel policies were adopted at joint board of directors meetings which involved TBN and all of its affiliates including NMTV.

G. Alleged Lack of Candor/Misrepresentation Issue

27. Glendale challenges NMTV's candor by referencing statements made by NMTV in its opposition to the petition to deny filed in connection with the proposed acquisition of WTGI(TV). Specifically, Glendale alleges that NMTV's statement that it was relying on a loan commitment from the Bank of California to acquire the Wilmington station, was deceptive because NMTV eventually used funds borrowed from TBN to make the escrow payment. Glendale also claims that NMTV was misleading when it stated that it "has its own bank accounts from which it pays its own employees and other creditors, and has its own revenues, from the sale of broadcast time and spots. NMTV receives its own contributions as a recognized 501(c)(3) organization." Glendale further claims that NMTV was not forthright about the role of its minority directors in the management and operation of NMTV.

28. In reply, TBF argues that NMTV's statement, that funds were available from the Bank of California, was not made untrue merely because NMTV eventually chose to obtain funds from another source. Moreover, TBF states that NMTV does have its own bank accounts and employees. Finally, NMTV states that it did not misrepresent Duff's role in the management and operation of NMTV.

29. In its comments on NMTV's Response, Glendale cites additional statements by NMTV which it believes are false or misleading. Glendale claims that Statements made by NMTV in LPTV applications filed in 1980 do not accurately reflect the relationship between NMTV and TBN. Furthermore, Glendale claims that NMTV's assertions that it controls its own finances are false and its claim that it produced local programming each week is false.

H. Allegations Concerning the Reporting of the Felony Conviction of Aguilar

30. Glendale states, and TBF concedes, that Aguilar was convicted of a felony in 1976. NMTV failed to report Aguilar's felony conviction in a timely manner after he became a member of NMTV's board of directors. Glendale contends that a reporting issue is warranted. In addition, Glendale contends that NMTV was untruthful when it stated in opposition to the petition to deny the Wilmington assignment application that it had just learned about Aguilar's 1976 conviction. Since Aguilar's conversion from a "drug addict, biker, and ex-convict" is an integral part of his ministry, Glendale contends that NMTV must have been aware of his felony conviction.

31. NMTV states that when it said that it had just learned of Aguilar's felony conviction, it was referring to communications counsel who had just learned of the conviction, not NMTV. NMTV's directors were aware of Aguilar's felony conviction long before he became a director but did not focus on the need to report it. Moreover, TBF asserts that Aguilar's conduct as a minister over the past ten years indicates that he has been rehabilitated.

IV. DISCUSSION

32. After consideration of the factual allegations contained in the pleadings before the Commission, we believe that a *prima facie* case has been made with regard to the alleged exercise of control over NMTV by TBN. Moreover, based on the information we have before us, a substantial and material question of fact is presented. In reaching this conclusion we are cognizant of the fact that both NMTV and TBN are nonstock, charitable corporations and have different characteristics than most profit oriented broadcast licensees. However, these characteristics do not persuade us that NMTV and TBN should be treated differently than for-profit licensees. The factors which we have traditionally considered when questions of *de facto* control are raised are equally applicable here. *See Southwest Texas Public Broadcasting Council, supra; The Trustees of the University of Pennsylvania Radio Station WXPN(FM), supra.*

33. There is evidence that TBN has asserted control over NMTV's board of directors in various ways. Specifically, since the creation of NMTV by TBN in September 1980, until October 1991, two of NMTV's three directors were high-ranking TBN employees. This provided TBN with a majority on NMTV's board of directors. Even since the addition of a fourth NMTV board member, TBN retains negative control of NMTV's board by virtue of the conduct of the two TBN employees. One of these directors, Duff, was an officer and director of TBN before being appointed to the NMTV board of directors. Moreover, she has continued in a high administrative position at TBN. Her position and conduct on the NMTV board of directors is integrally related to her role at TBN. In addition, Crouch is the president of both TBN and NMTV. As president of NMTV, Crouch has the authority under NMTV's bylaws to "supervise, direct and control the business and the officers of [NMTV]." Finally, for many years TBN and NMTV held joint boards of directors meetings along with other TBN affiliates.

34. There is also evidence that TBN controls NMTV's programming. Virtually all of NMTV's programming comes from TBN. NMTV could identify only two programs that it had produced in the past year without the assistance of TBN. Another weekly show that NMTV claims to produce is actually recorded in TBN's studios in Taustin, California, and broadcast on TBN's station KTBN-TV. Thus, it appears that NMTV produces little or no programming independent from TBN.

35. Furthermore, it appears that TBN provides accounting and bookkeeping services to NMTV including the preparation of NMTV's payroll, financial statements, federal and state income tax returns and reports, purchasing requirements, data processing, and servicing of NMTV's accounts payable. TBN has also "advanced/loaned" NMTV $4 million with no formal notes or repayment schedules. The "advances/loans" are repaid from unrestricted donations to TBN by people with zip codes within the NMTV stations' service contours. Moreover, while NMTV has its own bank accounts, the people authorized to sign on the accounts are generally TBN employees.

36. It also appears that TBN controls NMTV's personnel policies. Some of NMTV's personnel policies were adopted at joint boards of directors meetings with TBN and its

affiliates. In addition, the employee handbooks for NMTV and TBN are virtually identical. Finally, the person purportedly responsible for personnel matters at NMTV, Duff, is a long time TBN employee.

37. The evidence suggests that TBN and its employees may control nearly every aspect of NMTV's operation. Consideration of TBN's significant involvement in NMTV's finances, programming, and personnel, as well as TBN's apparent ability to dominate NMTV's board of directors leads to the conclusion that appropriate issues must be specified in this proceeding. Moreover, we specifically reject the thesis that "ownership" and not "control" is the only benchmark the Commission may use in determining compliance with the Commission's multiple ownership rules relating to minority-controlled entities. As the Commission has stated before "a realistic definition of the word control includes any act which vests in a new entity or individual the right to determine the manner or means of operating the licensee and determining the policy the licensee will pursue." *WHDH, Inc.*, 17 FCC 2d 856, 863 (1969).

38. In addition to a *de facto* control issue, we will specify an abuse of process issue. As we have stated in the past, "it is an abuse of process to specify a surrogate to apply for a station so as to deny the Commission and the public the opportunity to review and pass on the qualifications of that party." *Arnold L. Chase*, 5 FCC Rcd 1642, 1643 (1990). Thus, if TBN and/or Paul Crouch controlled NMTV from the outset and that fact had been disclosed, NMTV would not have been entitled to minority preferences in numerous LPTV lotteries. Moreover, NMTV would not have been allowed to acquire television stations which, in combination with the TBN-owned television stations, exceeded the limits of the Commission's multiple ownership rules. In those circumstances, it would be a clear abuse of process to put NMTV forward as ostensibly controlled by minorities in order to garner a minority lottery preference or to circumvent the Commission's multiple ownership rules.

39. While we are concerned about the truthfulness and honesty of licensees, we do not believe that Glendale has made a *prima facie* showing of intent to deceive which is required for a misrepresentation/lack of candor issue. *See, e.g., Fox River Broadcasting, Inc.*, 93 FCC 2d 127 (1983). However, the allegations raised by Glendale may be considered in connection with the abuse of process issue which we are specifying.

40. We will not specify the issues requested by Glendale concerning Aguilar's felony conviction. While there may have been a technical violation of the requirement to report Aguilar's felony conviction, Glendale does not allege, and we do not discern, any intent to deceive the Commission. Instead, it appears that the failure to report this matter was due to an oversight on behalf of the licensee. Moreover our belief that there was no deceptive intent involved here is bolstered by our determination that Aguilar's conviction would not be relevant to NMTV's qualifications to be a licensee because the crime did not involve fraud or dishonesty, occurred 16 years ago, and Aguilar has apparently been rehabilitated. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, at footnote 42 (1986)(subsequent history omitted)("*1986 Character Policy Statement*").

V. SALAD'S PETITION TO DENY

41. In challenging an application pursuant to Section 309(d) of the Communications Act of 1934, as amended, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

42. The Chairman of the Board of SALAD states in his declaration that he is a viewer of WHFT(TV) and that his agreement with the petition's allegations is based on personal knowledge except where based on official FCC records or evidence provided by other witnesses. Moreover, he states that SALAD is the principal Hispanic civil rights organization in Dade County, Florida. The Commission has previously held that a person may establish standing as a petitioner to deny if he alleges that he is a listener of a station and provides factual allegations to support his contention that it would not serve the public interest to grant the application in question. *See Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89, 98-99 (1980). The Commission also has held that an organization may establish standing if it provides an affidavit indicating that the group represents local residents. *Id.* at 99. Upon review of the declaration, we find that it meets the requirements to establish standing for SALAD. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987).

43. SALAD's Petition to Deny is a brief summary of allegations against TBN and NMTV which it seeks to support by requesting that all of the pleadings filed in connection with the WTGI(TV), Wilmington, Delaware, assignment application be incorporated by reference. Most of the issues raised by SALAD were also raised by Glendale and have been addressed herein. Moreover, matters raised by SALAD which are supported only by newspaper or magazine articles do not meet the requirement that petitions to deny be supported by an affidavit from a person having personal knowledge of the facts alleged. *See WPIX, Inc.*, 5 FCC Rcd 7469 (1990) and *KPRL, Inc.*, 5 FCC Rcd 2823 (1990). In addition, allegations about Aguilar's operation of Set Free as a "bizarre cult," even if true, would not be relevant in this proceeding. Finally, SALAD makes an unsupported claim that funds raised for the purchase of WTGI(TV) have not been returned to the donors. In response, it is stated that TBN is undergoing its yearly audit and that when it is completed, consistent with its standard practice, TBN will contact donors of these "restricted funds" and request instructions on the disposition of the gifts. TBN's certified public accountant states that this practice is consistent with generally accepted accounting principles. Accordingly, we will not specify a fraudulent fundraising issue.

VI. PROCEDURAL MATTERS

44. TBF, the licensee of WHFT-TV, is legally a separate entity from TBN. TBN is a programming supplier to TBF and also a Commission licensee of several television stations. While TBF is not a subsidiary of TBN, they share the same officers, directors, and operating policies. Because of this shared identity of interest and because the allegations herein relate to TBN, it will be made a party to this proceeding so that TBN's position may be fully advocated. *Cf. Shawn Phalen*, 7 FCC Rcd 7638, 7639 (1992)(collateral estoppel is problematic unless entity is made a party to the proceeding); *RKO General, Inc. (WAXY-FM)*, 5 FCC Rcd 642, 646 n.11 (1990). In addition, because the allegations relate to the *de facto* control of NMTV by TBN and/or Paul Crouch, we will make NMTV a party so that its position may be fully advocated. Finally, the petitioner, SALAD, will be made a party to this proceeding.

45. While TBN and NMTV are being made parties to this proceeding, we are not now going to call for early renewals or institute revocation proceedings against all NMTV, TBN or affiliate licenses. While the outcome of this proceeding could have implications for all stations licensed to NMTV, TBN and its affiliates, we believe that there is no need to designate those licenses for hearing at this time. Although the issues being specified in this case are not limited to the operation of WHFT(TV), we are not prepared, at this time, to conclude that they are so fundamental that they would affect the qualifications of NMTV, TBN or its affiliates to hold any station license. *See 1986 Character Policy Statement*, 102 FCC 2d at 1223. If issues (a) and (b), set forth below, are resolved against NMTV, TBN or its affiliates, the Commission will determine what actions are appropriate in connection with the stations licensed to these entities. In addition, NMTV, TBN and its affiliates are free to dispose of licenses during the pendency of this proceeding. NMTV, TBN and its affiliates may also acquire licenses during the pendency of this proceeding, subject to compliance with relevant Commission rules and policies, and provided that no more than a total of 12 commercial television stations shall be licensed to NMTV, TBN and its affiliates at any point in time.

VII. CONCLUSION

46. We have carefully reviewed the pleadings and related material before us, and, for the reasons indicated above, we believe that issues have been raised which must be explored in a hearing.

47. Except as indicated by the issues specified below, the applicants are qualified. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

48. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications ARE DESIGNATED FOR HEARING IN A COMPARATIVE PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

(a) To determine whether Paul F. Crouch, Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity Broadcasting Network (TBN) or its affiliates exercised *de facto* control over National Minority TV, Inc. (NMTV).

(b) To determine whether NMTV, Paul F. Crouch, TBN or its affiliates or principals abused the Commission's processes by using NMTV to evade the provisions of Section 73.3555(e) of the Commission's Rules and/or by using NMTV to improperly claim minority preferences in LPTV applications.

(c) To determine, in light of the evidence adduced pursuant to issues (a) and (b), whether Trinity Broadcasting of Florida, Inc., is qualified to remain a Commission licensee.

(d) To determine which of the proposals would, on a comparative basis, better serve the public interest.

(e) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

49. IT IS FURTHER ORDERED, That the Petitions to Deny filed by Glendale Broadcasting Company and the Spanish American League Against Discrimination ARE GRANTED to the extent indicated above, and ARE DENIED in all other respects.

50. IT IS FURTHER ORDERED, That the Request for Declaratory Ruling filed by National Minority TV, Inc., IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

51. IT IS FURTHER ORDERED, That the Trinity Christian Center of Santa Ana, Inc. d/b/a Trinity Broadcasting Network, National Minority TV, Inc., and Spanish American League Against Discrimination ARE MADE PARTIES to this proceeding.

52. IT IS FURTHER ORDERED, That irrespective of whether the hearing record warrants an Order denying the renewal application for Station WHFT(TV), it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER FOR FORFEITURE in an amount not to exceed $250,000, shall be issued against TBF, TBN and/or NMTV for willful and/or repeated violations of Section 310(d) of the Communications Act of 1934, as amended, and/or Section 73.3555(e) of the Commission's Rules, which occurred or continued within the applicable statute of limitations.

53. IT IS FURTHER ORDERED, That in connection with the possible forfeiture liability noted above, this document constitutes a notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended.

54. IT IS FURTHER ORDERED, That Glendale and SALAD shall have the burden of proceeding with the introduction of evidence as to issues (a) through (c), and that TBF, TBN and NMTV shall have the burden of proof as to issues (a) through (c).

55. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order SHALL BE SERVED on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service SHALL BE ADDRESSED to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Fed-

eral Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order also SHALL BE SERVED on the Chief, Data Management Staff, Mass Media Bureau, Federal Communications Commission, 1919 M Street, N.W., Room 350, Washington, D.C. 20554.

56. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, TBF, Glendale, TBN, NMTV and SALAD, pursuant to Section 1.221(c) of the Commission's Rules, in person or by their respective attorneys, within 20 days of the mailing of this Order, SHALL FILE in triplicate, A WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

57. IT IS FURTHER ORDERED, That the applicants herein, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, SHALL GIVE NOTICE of the hearing within the time and in the manner prescribed, and SHALL ADVISE the Commission of the publication of such notice, as required by Section 73.3549(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-74

In the Matter of

Amendment of Section 73.202(b), RM-8153
Table of Allotments,
FM Broadcast Stations.
(Yermo, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 8, 1993; Released: April 8, 1993

Comment Date: June 1, 1993
Reply Comment Date: June 16, 1993

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Antelope Broadcasting Co., Inc. ("petitioner"), permittee of Station KYHT(FM), Channel 287A, Yermo, California, seeking the substitution of Channel 287B1 for Channel 287A and modification of its authorization accordingly. Petitioner stated its intention to apply for Channel 287B1 if it is allotted to Yermo as requested.

2. We believe the public interest would be served by proposing the substitution of Channel 287B1 for Channel 287A at Yermo since it could provide an enhanced service to the community. Channel 287B1 can be allotted to Yermo at the petitioner's specified site, located 27.6 kilometers (17.1 miles) northeast of the community,[1] consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules. As Yermo is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain concurrence of the Mexican government in the proposal.[2]

3. Additionally, we note that, at the rule making level, a Class B1 allotment is assumed to provide 70 dBu service to the entire community of license where the transmitter is located no more than 23.2 kilometers (14.3 miles) from the community's most distant boundary. Therefore, petitioner is expected to submit an engineering exhibit by the comment date demonstrating that its proposal would comply with the principal city coverage requirements of Section 73.315(a) of the Commission's Rules. The engineering exhibit should include maps outlining the actual community boundaries of Yermo and the pertinent 70 dBu contour. Failure to provide the requested information could result in a denial of the proposal.

4. The petitioner's modification request at Yermo conforms with the provisions of Section 1.420 of the Commission's Rules. Therefore, we shall propose to modify the authorization of Station KYHT(FM) without entertaining competing expressions of interest in the use of Channel 287B1 at Yermo, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

5. In view of the above, the Commission believes it is appropriate to solicit comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Yermo, California, as follows:

	Channel No.	
City	Present	Proposed
Yermo, California	251B, 287A	251B, 287B1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **June 1, 1993,** and reply comments on or before **June 16, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John F. Garziglia, Esq.
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

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[1] Coordinates at the petitioner's specified site for Channel 287B1 at Yermo are 35-01-39 and 116-33-51. The site restriction is required to avoid short-spacing to the authorized site of Station KIQQ-FM, Channel 285A, Lenwood, California, at coordinates 34-51-20 and 117-02-57, as well as to Station KKGO-FM, Channel 286B, Los Angeles, California, at coordinates 34-13-45 and 118-28-68, and to Station KDUQ(FM), Channel 289A, Ludlow, California, at coordinates 34-42-21 and 116-12-38. Petitioner should note the pendency of a proposal at Lenwood, California, (RM-8154) requesting *inter alia,* the substitution of Channel 283A for Channel 285A and modification of the authorization for Station KIQQ-FM. If the Lenwood substitution is granted, it will eliminate only that aspect of the petitioner's need to restrict the location of its transmitter site to accommodate its modification proposal for Station KYHT(FM) at Yermo.

[2] Consideration of this proposal, and termination of this proceeding, is conditioned upon the adoption of a working arrangement between the United States and Mexican governments to implement the 1992 U.S./Mexico FM Broadcast Agreement.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-73

In the Matter of

Amendment of Section 73.202(b), RM-8097
Table of Allotments,
FM Broadcast Stations.
(Nogales, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 8, 1993; Released: April 8, 1993

Comment Date: June 1, 1993
Reply Comment Date: June 16, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Felix Corporation ("petitioner") seeking the allotment of Channel 256A to Nogales, Arizona, as that community's second local FM service. Petitioner stated its intention to apply for Channel 256A if it is allotted to Nogales.

2. We believe the public interest would be served by proposing the allotment of Channel 256A to Nogales since it could provide an additional local aural transmission service to the community. Channel 256A can be allotted to Nogales in conformity with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules, provided the transmitter is located at least 2 kilometers (1.2 miles) east of the community[1] to avoid a co-channel short-spacing to a proposal to allot Channel 256B to Sonoita, Sonora, Mexico.[2] Additionally, since Nogales is located within 320 kilometers (199 miles) of the United States-Mexican border, the Commission must obtain the concurrence of the Mexican government in the proposal.

3. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Nogales, Arizona, as follows:

	Channel No.	
City	Present	Proposed
Nogales, Arizona	252A	252A, 256A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 1, 1993,** and reply comments on or before **June 16, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Robert Lewis Thompson, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Coordinates for Channel 256A at Nogales are 31-20-24 and 110-54-56.

[2] Coordinates for proposed Channel 256B at Sonoita are 31-51-52 and 112-41-30. Consideration of this proposal, and termination of this proceeding, is conditioned upon the adoption of a working arrangement between the United States and Mexican governments to implement the 1992 U.S./Mexico FM Broadcast Agreement.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-65

In the Matter of

Amendment of Section 73.202(b), RM-6869
Table of Allotments,
FM Broadcast Stations.
(New Port Richey and
Sarasota, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 9, 1993; Released: April 8, 1993

Comment Date: June 1, 1993
Reply Comment Date: June 16, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by WGUL-FM, Inc. ("petitioner"), licensee of Station WGUL(FM), Channel 288A, New Port Richey, Florida, requesting the substitution of Channel 288C3 for Channel 288A at New Port Richey and the modification of its license to specify operation on the higher class channel.[1] In order to accomplish the upgrade at New Port Richey, petitioner also requests the substitution of Channel 282A for Channel 288A at Sarasota, Florida, and the modification of Station WKZM(FM)'s construction permit to specify Channel 282A.

2. We believe the proposal warrants consideration, since the proposed substitution of Channel 288C3 for Channel 288A at New Port Richey would provide that community with a wide coverage area FM service. Channel 288C3 can be allotted to New Port Richey in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 0.9 kilometers (0.5 miles) west at petitioner's current licensed transmitter site.[2] Channel 282A can be substituted for Channel 288A at Sarasota in compliance with the minimum distance separation requirements of the Commission's Rules at Station WKZM(FM)'s construction permit site.[3] In accordance with Section 1.420(g) of the Commission's Rules, we propose to modify Station WGUL(FM)'s license to specify operation on Channel 288C3. We also propose to modify the construction permit for Station WKZM(FM), Channel 288A, Sarasota, Florida, to specify operation on Channel 282A.

3. Whenever an existing licensee or permittee is ordered to change frequencies in order to accommodate a new channel allotment, Commission policy requires the benefitting party to reimburse the affected station for costs incurred therewith. Petitioner states its willingness to reimburse the permittee of Station WKZM(FM) for the reasonable costs associated with the change in channels at Sarasota, Florida. Petitioner also includes an agreement it has with the permittee of Station WKZM(FM) relative to the costs of changing its channel.

4. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
New Port Richey, Florida	288A	288C3
Sarasota, Florida	273C, 288A, 293C2	273C, 282A, 293C2

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of the *Order* to the following:

Mr. Lowell A. Brubaker, President
Christian Fellowship Mission, Inc.
P.O. Box 7627
Sarasota, Florida 34278

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **June 1, 1993,** and reply comments on or before **June 16, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Irving Gastfreund
Kaye, Scholer, Fierman, Hays & Handler
The McPherson Building
901 15th Street, N.W.
Washington, D.C. 20005
(Attorney for WGUL-FM, Inc.)

[1] Petitioner also filed a petition for rule making requesting the substitution of Channel 288C2 for Channel 288A at New Port Richey. This proposal requires the substitution of Channel 289A for Channel 288A at Sebring, Florida. This proposal is unacceptable for consideration because Channel 289A at Sebring would be short-spaced to Station WWOJ, Channel 292A, Avon Park, Florida.

[2] The coordinates for Channel 288C3 at New Port Richey are North Latitude 28-15-32 and West Longitude 82-43-54.

[3] The coordinates for Channel 282A at Sarasota are North Latitude 27-16-30 and West Longitude 82-28-54.

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-283

In the Matter of

Amendment of Section 73.202(b), RM-8122
Table of Allotments,
FM Broadcast Stations.
(Hope and Fordyce, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 12, 1993; Released: April 8, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making* ("*Notice*"), 7 FCC Rcd 7993 (1992), issued in response to a petition for rule making filed on behalf of KdB, Inc. ("petitioner"), licensee of Station KXAR-FM, Channel 269A, Hope, Arkansas, proposing the substitution of Channel 269C2 for Channel 269A, and modification of its license accordingly. To accommodate its proposal, petitioner also requested the substitution of Channel 272A for Channel 269A at Fordyce, Arkansas, and modification of the license issued to Dallas Properties, Inc. ("Dallas"), for Station KQEW(FM). Petitioner filed supporting comments reiterating its intention to apply for Channel 269C2 if allotted to Hope, as requested. Dallas filed informal comments in opposition to the rule making proposal insofar as it seeks to modify its license to specify another Class A channel at Fordyce.[1] Ouachita Communications, Inc. ("Ouachita")[2] also filed comments. Dallas filed reply comments. No other comments were received.

2. In its comments petitioner reaffirms its interest in the Channel 269C2 upgrade at Hope and the modification of its license for Station KXAR-FM. Moreover, petitioner reiterates its willingness to reimburse Dallas for its reasonable costs associated with the channel change for Station KQEW(FM) at Fordyce.

3. Ouachita's comments interpose no objection to the petitioner's modification proposal at Hope, but urge that the upgrade of Station KXAR-FM be conditioned on approval of its modification application for Station KENA-FM at Mena, Arkansas.[3]

4. Dallas' reply comments acknowledge that the costs to be incurred in connection with the frequency change for Station KQEW(FM) will be governed by established Commission policy and only in the event of a disagreement will the Commission intercede in a dispute, citing *Gouverneur and Ogdensburg, New York*, 45 RR 2d 763 (1979). Dallas states that since the petitioner has agreed to reimburse the licensee of Station KQEW(FM) for its reasonable costs, it is giving notification now of its anticipated costs associated with the modification of Station KWEQ(FM), appending a list of contemplated expenses to its comments.

5. We believe the public interest would be served by substituting Channel 269C2 for Channel 269A at Hope, and by substituting Channel 272A for Channel 269A at Fordyce, since it could enable Station KXAR-FM to provide an enhanced coverage FM service to the community. Additionally, Station KQEW(FM) will be afforded an opportunity to operate at maximum Class A facilities, a benefit not presently available to that community, and thereby increase its coverage area in Fordyce. Therefore, we will modify the license of Station KXAR-FM to specify operation on Channel 269C2. Channel 272A can be used by Station KQEW(FM) at its present location. Therefore, we are modifying herein the license of Station KQEW(FM) to specify operation on Channel 272A in lieu of Channel 269A at Fordyce, as proposed in the *Notice*. Petitioner has restated its intention to reimburse Station KQEW(FM), Fordyce, for the reasonable costs associated with modifying the station from Channel 269A to Channel 272A.

6. Pursuant to Commission policy, reimbursement to Station KQEW(FM) for the reasonable costs of changing its frequency will be governed by *Circleville and Columbus, Ohio*, 8 FCC 2d 159 (1967). We expect the parties to negotiate in good faith, subject to Commission review only in the event of disagreement. *See Mayfield and Wickliff, Kentucky*, 48 RR 2d 1232 (1981).[4]

7. As indicated in the *Notice*, Channel 269C2 can be substituted for Channel 269A at the petitioner's suggested site, located 2.6 kilometers (1.6 miles) west of the community,[5] in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules. Channel 272A can be substituted for Channel 269A at Fordyce at the authorized site for Station KQEW(FM).[6]

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[1] These comments were not filed in accordance with the requirements of Section 1.420(c) of the Commission's Rules and paragraph 4 of the Appendix to the *Notice of Proposed Rule Making* since they were not served on the petitioner. Nevertheless, we have reviewed the comments and find that they fail to demonstrate that Station KQEW(FM) would be harmed by the modification of its license to specify operation on another Class A channel. Therefore, we will not consider these comments further in this proceeding, although we will consider Dallas' reply comments.

[2] Ouachita is the licensee of Station KENA-FM, Channel 269A, Mena, Arkansas.

[3] As stated in the *Notice*, although the proposal for Channel 269C2 at Hope conflicts with the presently licensed operation of Station KENA-FM on Channel 269A at Mena, Arkansas, at coordinates 34-34-23 and 94-14-55, Station KENA-FM has been modified to specify operation on Channel 271C2 in MM Docket No. 89-290. *See* 7 FCC Rcd 5493 (1992).

[4] Therefore, we offer no determination regarding Dallas' list of anticipated expenses at this time.

[5] Coordinates used for Channel 269C2 at Hope are 33-40-15 and 93-37-10. As indicated earlier, since the Hope proposal is short-spaced to the presently licensed operation of Station KENA-FM on Channel 269A at Mena, Arkansas, the issuance of a license for Station KXAR-FM on Channel 269C2 at Hope may be withheld until Station KENA-FM is authorized to operate on Channel 271C2 at Mena. We will serve a copy of this *Report and Order* on the licensee of Station KENA-FM.

[6] Coordinates at the licensed site of Station KQEW(FM) are 33-48-17 and 92-26-07.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 24, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Hope, Arkansas	269C2, 285A
Fordyce, Arkansas	272A

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of KdB, Inc. (File No. BLH-850117KY) for Station KXAR-FM, Hope, Arkansas, IS MODIFIED to specify operation on Channel 269C2 in lieu of Channel 269A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Dallas Properties, Inc. (File No. BLH-820323AA) for Station KQEW(FM), Fordyce, Arkansas, IS MODIFIED to specify operation on Channel 272A in lieu of Channel 269A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KQEW's license (File No. BLH-820323AA), except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license File No. BLH-820323AA, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

11. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, KdB, Inc., licensee of Station KXAR-FM, is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KQEW(FM) as follows: Dallas Properties, Inc., 303 Spring Street, Fordyce, Arkansas 71742, and to Ouachita Communications, Inc., Radio Station KENA-FM, 1207 Texas, Mena, Arkansas 71953.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-76

In the Matter of

Amendment of Section 73.202(b), RM-8196
Table of Allotments,
FM Broadcast Stations.
(Chateaugay, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 15, 1993; Released: April 8, 1993

Comment Date: June 1, 1993
Reply Comment Date: June 16, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Vector Broadcasting Inc. ("petitioner"), requesting the substitution of Channel 234C2 for Channel 234A at Chateaugay, New York, and the modification of Station WYUL's construction permit to specify operation on the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 234C2 can be allotted to Chateaugay in compliance with the Commission's minimum distance separation requirements, with respect to domestic allotments, at the transmitter site specified in Station WYUL's construction permit (File No. BPH-900518MN).[1] The allotment would be short-spaced to Stations CIMF-FM, Channel 235C1, Hull, Quebec, CHWY, Channel 236B, Montreal, Quebec, unoccupied Channel 234C1, Trois Rivieres, Quebec, and proposed Channel 234C1 at Vianney, Quebec, Canada. However, we believe that use of Channel 234C2 at Chateaugay can be restricted so as to avoid causing prohibited interference to the Canadian operations. Because Chateaugay is located within 320 kilometers (200 miles) of the U.S.-Canadian border, we have requested concurrence by the Canadian government in the allotment as a specially negotiated allotment.

3. We believe the public interest would be served by proposing the substitution of Channel 234C2 for Channel 234A at Chateaugay since it could provide the community with a wide coverage area FM allotment and enable Station WYUL to expand its service area. As requested, we also propose to modify Station WYUL's construction permit to specify operation on Channel 234C2. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Chateaugay or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Chateaugay, New York	234A	234C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 1, 1993,** and reply comments on or before **June 16, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Brian M. Madden, Esq.
Leventhal, Senter & Lerman
2000 K Street, N.W., Suite 600
Washington, D.C. 20006-1809
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

[1] The coordinates for Channel 234C2 at Chateaugay are North Latitude 44-49-41 and West Longitude 73-58-43.

ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-56

In re Applications of

C. DEVINE MEDIA, INC. File No. BRH-900604YE

For Renewal of License of
Station KBER-FM
Ogden, Utah

STREET STRYDER File No. BRH-900601A3

For Renewal of License of
Station KQOL-FM
Spanish Fork, Utah

HEARING DESIGNATION ORDER AND NOTICE OF FORFEITURE

Adopted: March 9, 1993; Released: April 8, 1993

By the Commission:

1. The Commission has before it for consideration: (a) the license renewal applications of the captioned licensees, C. Devine Media, Inc. (Devine), for Radio Station KBER-FM, Ogden, Utah, and Street Stryder (Stryder), for Radio Station KQOL-FM, Spanish Fork, Utah; and (b) the results of its investigation of stations KBER-FM and KQOL-FM.

2. Information supplied by the licensees on applications submitted to the Commission and in response to Commission letters of inquiry, a Petition for Reconsideration of a grant of an application for the assignment of the license of Station KQOL-FM from Devine to Stryder, and an independent investigation by Commission staff, indicate that Devine may have engaged in a sham assignment of the license of KQOL-FM to Stryder to circumvent the Commission's multiple ownership rules set forth in Section 73.3555(a)(2) of the Commission's Rules.[1] It also appears that Stryder may have engaged in an unauthorized assignment of KQOL's license in violation of Section 73.3540 of the Commission's Rules[2] and Section 310 of the Communications Act.[3] Furthermore, the responses of both licensees to Commission inquiries concerning this assignment appear to have been false or deceptive, in violation of Sections 73.1015 and 1.17 of the Commission's Rules[4] and raise substantial and material questions as to whether Devine and Stryder possess the requisite qualifications to warrant granting the applications for renewal of the licenses of KBER-FM and KQOL-FM.[5]

3. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, C. Devine Media, Inc., and Street Stryder, ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

(a) To determine whether Devine and Stryder violated Section 73.3555(a)(2) of the Commission's Rules by engaging in a sham assignment of the license of Station KQOL-FM, Spanish Fork, Utah, from Devine to Stryder;

(b) To determine whether Stryder violated Section 73.3540 of the Commission's Rules and Section 310(d) of the Communications Act by engaging in an unauthorized assignment of the license of Station

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[1] Section 73.3555 of the Commission's Rules governing multiple ownership of radio stations has recently been amended. *See In re Revision of Radio Rules and Practices*, 7 FCC Rcd 6387 (September 4, 1992). However, the rule in effect at the time of the transaction in question provided:

> Section 73.3555(a) of the Commission's Rules provides: No license for an... FM broadcast station shall be granted to any party ... if such party directly or indirectly owns, operates, or controls one or more broadcast stations in the same service and the grant of the license will result in:
>
> ....
>
> (2) Any overlap of the predicted 3.16 mv/M contours of the predicted 3.16 mv/M contours of the existing and proposed FM stations, computed in accordance with Section 73.313.

[2] Section 73.3540 of the Commission's Rules provides:

> (a) Prior consent of the FCC must be obtained for a voluntary assignment or transfer of control.

[3] Section 310(d) of the Communications Act provides:

> No... station license, or any rights thereunder shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily... except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

[4] Sections 73.1015 and 1.17 of the Commission's Rules provide:

> ... No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

[5] Two applications for assignment of station licenses currently pending before the Commission will be deferred pending the outcome of this proceeding. One is for the assignment of Station KZHT-FM, Provo, Utah, from Golden Bear-1 Broadcasting, Inc. to Chestnut II, Inc., whose principals are also the principals of C. Devine Media, Inc. (BALH-921118HL). The other is an application seeking consent to assign the license of Station KQOL-FM, Spanish Fork, Utah, from Street Stryder to Sullivan Media Corporation. (BALH-920409GK). Action on any other subsequently proposed assignments involving the acquisition of an interest in a station by any of the principals of C. Devine Media, Inc., or by Street Stryder, will be deferred pending the outcome of this proceeding.

KQOL-FM to Steve Evans, the brother-in-law of Chris Devine, one of the principals of C. Devine Media, Inc.;

(c) To determine whether Devine and Stryder violated Sections 73.1015 and 1.17 of the Commission's Rules by making misrepresentations to the Commission concerning the foregoing;

(d) To determine, in light of the evidence adduced under the foregoing issues, whether Devine and Stryder possess the requisite qualifications to warrant the grant of the applications for renewal of the licenses of Stations KBER-FM and KQOL-FM.

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, is directed to serve upon Devine and Stryder within thirty (30) days of the release of this Order, a Bill of Particulars with respect to all the foregoing issues.

5. IT IS FURTHER ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, both the burden of proceeding with the evidence and the burden of proof shall be upon the applicants as to all issues specified herein.

6. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, each applicant, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, shall, within twenty (20) days of the mailing of this order, file with the Commission in triplicate a written appearance stating an intention to appear on the date fixed for hearing and present evidence on the issues specified in this order.

7. IT IS FURTHER ORDERED, That if it is determined that the hearing record does not warrant an Order denying the applications for renewal of the licenses of Devine and Stryder for Radio Stations KBER-FM and KQOL-FM, it shall also be determined if Devine and Stryder have willfully or repeatedly violated Section 73.3555(a)(2) of the Commission's Rules (multiple ownership), Sections 73.3540 of the Commission's Rules and Section 310(d) of the Communications Act (unauthorized assignment), and Sections 73.1015 and 1.17 of the Commission's Rules (candor in communications with the Commission). If so, it shall also be determined whether Orders for Forfeiture shall be issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, in an amount up to $250,000 each for the willful or repeated violation of Sections 73.3555(a)(2), 73.3540, 73.1015, and 1.17 of the Commission's Rules, and Section 310(d) of the Communications Act.

8. IT IS FURTHER ORDERED, That, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended. The Commission has determined that, in every case designated for hearing involving revocation or denial of assignment, transfer, or renewal of license for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Since the procedure is thus a routine or standard one, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of the case should be; that judgment is, of course, to be made on the facts of each case.

9. IT IS FURTHER ORDERED, That the applicants herein, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, shall give notice of the hearing within the time and in the manner prescribed in such Rule and shall advise the Commission thereof as required by Section 73.3594(g) of the Rules.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Order by *Certified Mail-Return Receipt Requested* to:

Chris Devine
c/o C. Devine Media, Inc.
Licensee of Station KBER-FM, Ogden, Utah
130 East Dempster
Evanston, Illinois 60604

Street Stryder
Licensee of Station KQOL-FM, Spanish Fork, Utah
672 Hendy Creek Road
Pine City, New York 14871

Aaron Shainis, Esq.
Baraff Koerner Olender & Hochberg
5335 Wisconsin Avenue, N.W., Suite 300
Washington, D.C. 20015

Harry Martin, Esq.
Reddy Begley & Martin
2033 M Street, N.W., Suite 20036
Washington, D.C. 20036

Vincent A. Pepper, Esq.
Pepper & Corazzini
1776 K Street, N.W., Suite 200
Washington, D.C. 20006

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-95

In re Applications of

ERIC R. HILDING (hereafter "Hilding") File No. BPH-911115MR

JUDY YEP HUGHES (hereafter "Hughes") File No. BPH-911115MT

For Construction Permit
for a New FM Station on Channel 281A
in Windsor, California

HEARING DESIGNATION ORDER

Adopted: March 18, 1993; Released: April 8, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Engineering Discrepancy.* On April 14, 1992, Hilding filed a petition to deny Hughes' application. Among the several allegations in his petition is Hilding's assertion that Hughes' proposed effective radiated power (ERP) of 0.25 kilowatts exceeds the maximum allowed power from the actual antenna site. Hughes proposes to locate her antenna atop Mount Jackson at the Kushnir/Empire Communications site. On April 27, 1992, Hughes filed an opposition to Hilding's petition to deny in which she contends that the ERP/HAAT combination is in compliance with the Commission's Rules and refers to an earlier construction permit (File No. BPH-860220IB) granted for Station KMGG(FM) which specifies the same site elevation and similar facilities as Hughes' application. On May 5, 1992, Hilding filed a reply to Hughes' opposition which includes a detailed survey map for the Kushnir/Empire Communications site on Mount Jackson. This survey map indicates that the site elevation is 499 meters instead of 488 meters as specified in Hughes' application. This would yield an antenna height above average terrain (HAAT) for Hughes' proposal of 348 meters instead of 337 meters. The allotment for Channel 281A at Windsor, California is an "old" Class A allotment and both applicants must satisfy the requirements of 47 C.F.R. § 73.213. An engineering study by the Commission staff indicates that this new HAAT value would produce a distance to the 1 mV/m (60 dBu) contour of 24.2 kilometers instead of 23.9 kilometers as would be produced by Hughes' proposal. Since both distances round to 24 kilometers and the Commission has previously authorized similar facilities at the proposed site which specified the same site elevation as Hughes' proposal, neither HAAT value would cause Hughes' application to be unacceptable for filing. Accordingly, in light of the survey map submitted by Hilding, Hughes must amend her application to specify a site elevation of 499 meters.[1]

3. *Environmental.* The applicants propose to side-mount their FM antennas on an existing tower with other RF contributors. Pursuant to OST Bulletin No. 65, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," when persons have access to the site, the transmitter power must be reduced or completely eliminated in order to comply with FCC guidelines. Furthermore, in situations like the applicants', where there are multiple contributors to radiofrequency radiation, all stations are required to reduce power or cease operations as necessary to assure safety with respect to radiofrequency radiation with regard to persons having access to the site. Accordingly, any subsequent grant will be subject to the following condition:

> "The permittee/licensee in coordination with other users of the site must reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radiofrequency radiation in excess of FCC guidelines."

4. *Late-Filed Amendments.* Hilding petitioned for leave to amend his application on December 3, 1992. Hughes petitioned for leave to amend her application on April 29 and May 20, 1992. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

5. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

[1] The remainder of the petition to deny is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 214-215 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these petitions have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229.

7. IT IS FURTHER ORDERED, That, in accordance with note 1 hereinabove, the petition to deny filed on April 14, 1992 by Hilding IS DISMISSED.

8. IT IS FURTHER ORDERED, That Hughes shall submit the amendment, as specified in Paragraph 2 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That, in accordance with Paragraph 3 above, in the event of grant of the Hilding or Hughes application, the construction permit shall contain the following condition:

> "The permittee/licensee in coordination with other users of the site must reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radiofrequency radiation in excess of FCC guidelines."

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Hilding (12/3/92) and Hughes (4/29, 5/20/92) ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-89

In re Applications of

AURIO A. MATOS (hereafter "Matos") File No. BPH-911114MS

LLOYD SANTIAGO-SANTOS AND LOURDES RODRIGUES BONET (hereafter "Santos and Bonet") File No. BPH-911115MP

For Construction Permit
for a New FM Station on Channel
293A in Culebra,
Puerto Rico

HEARING DESIGNATION ORDER

Adopted: March 18, 1993; Released: April 8, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matter.* An examination of these applications reveals that the entire allotment for Channel 293A at Culebra, Puerto Rico is short-spaced to the proposed second-adjacent channel allocation of Channel 291B at Vieques, Puerto Rico. *See Further Notice of Proposed Rulemaking* in MM Docket No. 91-259, 7 FCC Rcd 3324, 3328 (M.M. Bur. 1992). This proceeding also proposes, *inter alia*, to change the Culebra allotment from Channel 293A to Channel 254A. Nonetheless, the applicants for the Culebra allotment will be permitted to proceed to comparative hearing. However, it shall be ordered that any construction permit awarded as a result of the outcome of this proceeding shall be made contingent on the outcome of MM Docket No. 91-259.

3. *Matos.* Matos petitioned for leave to amend his application on December 8, 1992. The accompanying amendment was filed after March 2, 1992, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

4. Matos' statement of compliance with the worker safety provision of OST Bulletin No. 56, October 1985, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation" is insufficient. Matos states simply that it will reduce power or cease operation to protect workers. However, in situations such as Matos', where there are multiple contributors to radiofrequency radiation, all stations are required to reduce power or cease operations as necessary to assure safety with respect to radiofrequency radiation with regard to persons have access to the site. *See Public Notice* entitled "Radiofrequency Radiation and the Environment," Mimeo No. 24479 (August 19, 1992). Accordingly, any subsequent grant will be subject to the following condition:

> The permittee/licensee in coordination with other users of the site must reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radiofrequency radiation in excess of FCC guidelines.[1]

5. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That any grant made as a result of this proceeding shall be made contingent on the outcome of MM Docket No. 91-259.

9. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Matos IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated.

[1] While Santos and Bonet's application addressed the worker safety issue adequately, grant of their application will contain the following condition:

> The permittee/licensee must reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radiofrequency radiation in excess of FCC guidelines.

10. IT IS FURTHER ORDERED, That, as specified in Paragraph 4 above, any construction permit issued in this proceeding shall contain the appropriate condition regarding protection of workers and others with authorized access to the site, tower or antenna.

11. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.1221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325 (c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in (a) the Standard Document Production Order (See Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *on reconsideration.*, FCC 91.154, paras. 7-8 & n.3, Appendix paras. 3 & 5, released May 15, 1991.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-102

In re Application of

Americom, A California
Limited Partnership

KHTZ(AM), Truckee, CA BP-871007AI

For Construction Permit to
Change Community of License
and Transmitter Site

HEARING DESIGNATION ORDER

Adopted: March 31, 1993; Released: April 8, 1993

By the Chief, Mass Media Bureau:

1. The Chief, Mass Media Bureau, has before him for consideration the above-captioned application filed by Americom, a California Limited Partnership, licensee of KHTZ(AM), Truckee, California ("Americom").[1] This application (File No. BP-871007AI) is for a construction permit to change the community of license and the transmitter site of KHTZ(AM) from Truckee, California, to Sparks, Nevada. Americom seeks to change its community of license, contending that it has been unable to find a suitable transmitter site from which to serve Truckee after being evicted from its licensed site in 1983.[2] On March 28, 1988, Constant Communications of Nevada, Inc. ("Constant"), filed a petition to deny Americom's application.[3] Americom filed a response to Constant's petition on May 2, 1988. Constant requested an extension of time to reply to Americom's response, which was opposed by Americom.[4]

2. In its petition, Constant requests that Americom's application be denied. Constant alleges that KHTZ(AM)'s proposed relocation violates Section 307(b) of the Communications Act of 1934, as amended, because the removal of KHTZ(AM) from Truckee to Sparks would leave Truckee without local radio service while Sparks is the community of license for both KPLY(AM) and KKMR-FM.[5] Constant also alleges that Americom has failed to provide any documentation for its claim that it cannot find a suitable site for KHTZ(AM) in the Truckee area. Constant supports this allegation with a letter from a local real estate agent which details available sites for radio facilities in and around Truckee.[6]

3. In its response to Constant's petition, Americom states that there are no sites in Truckee which are suitable for KHTZ(AM). Americom characterizes Constant's contentions regarding the availability of sites as hearsay and states that the real estate agent has no competence to determine which sites may be suitable for radio transmitter facilities. Americom asserts that after being evicted from its licensed site ("Site 1"), it received a special temporary authority from the Commission to broadcast from a site near Truckee ("Site 2") which did not cover Truckee with a nighttime signal. In an effort to relocate permanently at Site 2, Americom attempted to modify its construction permit, which application, as noted, was denied. Finally, Americom argues that Section 307(b) of the Communications Act of 1934, as amended, does not preclude the grant of an application where, as here, suitable alternative sites are unavailable.[7]

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[1] The former call sign for KHTZ(AM) was KHTX(AM).

[2] Americom also has pending an application for the license renewal of KHTZ(AM) (File No. BR-900731D4). KHTZ(AM) went silent in 1988. Americom had previously filed an application to relocate its transmitter site (File No. BMP-850130AD). At that time, Americom was operating under special temporary authority from the site proposed therein. The application was dismissed because nighttime coverage of Truckee could not be achieved from the proposed site.

[3] At the time of the filing of the petition, Constant was the licensee of KQLO(AM), Reno, Nevada. Constant asserted that it had standing to file the present petition to deny under 47 U.S.C. Sec. 309(d) because KHTZ(AM)'s proposed relocation to Sparks, Nevada would place KHTZ(AM) in the Reno radio market and that the proposed contours of KHTZ(AM) would overlap the contours of KQLO(AM). Consequently, the two stations will compete for listeners and advertisers. *See, e.g., American Homes Stations, Inc.*, 64 FCC 2d 955 (1977). On August 29, 1989, the Commission granted an assignment of the KQLO(AM) license from Constant to Pacific Telecom, Inc. ("PTI") (File No. BAL-890717EE). By letter dated March 24, 1993, PTI requested that the petition to deny filed by its predecessor-in-interest, Constant, be withdrawn. This request for withdrawal, however, does not preclude consideration of the issues raised by Constant as they relate to the public interest, convenience and necessity.

[4] Although Constant's reply was filed outside the pleading cycle described in 47 C.F.R. Sec. 1.45, it is considered to the extent that it addresses issues relevant to our consideration of this application. We also note that the one-week delay created no hardship for Americom in this case.

[5] KHTZ(AM), operating from Americom's proposed site, would not cover Truckee with 5 mV/m service, daytime, or interference-free service at night.

[6] In this letter, Bryan J. Drakulich, a real estate agent in the Truckee area, states that there are locations available in the Truckee area suitable for a radio transmitter site. Americom asserts that the realtor's letter is "worthless because it does not address the engineering aspects" of such locations, and, consequently, requests that the Commission dismiss the entire petition as a sham or "strike" pleading. The Commission, however, will not dismiss a petition to deny as a "strike" or sham petition unless it appears that the petition is "patently frivolous or wholly vexatious." *Faulkner Radio Corp. v. FCC*, 557 F.2d 866 (D.C. Cir. 1977). In the present case, the Constant petition raises legitimate issues, including those relating to Section 307(b) of the Communications Act of 1934, as amended, which are relevant to our consideration of applications for change of community of license. *See, e.g., Ark-Valley Broadcasting Company, Inc.*, 15 FCC 818 (1951). We therefore cannot conclude that the raising of such issues is frivolous or vexatious so as to warrant dismissal of the pleading.

[7] Americom also contends that the Commission "suggested" that KHTZ(AM) file an application to change its community. This apparently refers to the November 7, 1986 letter of the Chief, Audio Services Division, which denied a petition for

4. Constant filed a reply to Americom's response, asserting that there is another site ("Site 3") in the Truckee area which Americom has failed to consider. Constant states that Americom was granted a building permit for a 200-foot tower on Site 3 in 1983, after which time Americom applied for a local zoning variance to increase the tower height to 400 feet while allowing its permit for a 200-foot tower to expire. According to Constant, citing relevant records from the Nevada County Planning Department, Americom thereafter "voluntarily abandoned" that site.[8]

5. On June 28, 1989, the Commission staff requested that Americom provide additional information regarding its efforts to find a suitable site from which to serve Truckee, with specific emphasis concerning its efforts to secure a permit for Site 3. Americom responded by letter dated July 28, 1989, as supplemented on August 17, 1989, asserting that Americom was granted a variance for Site 3 by the Nevada County Planning Commission but was later notified that inadequate notice had been given to the adjacent site owners. At that time, Americom concluded that the variance was not authorized and now argues that an effort to secure a building permit for a tower of 200 or 400 feet would presently be zealously opposed by the local residents.[9] Americom also contends that zoning in Truckee, as part of the Lake Tahoe Basin, is very strictly regulated.

6. Americom, however, fails to provide support for its contention that all sites capable of serving Truckee are, in fact, within the strict zoning regulations of the Lake Tahoe Basin, or are otherwise precluded by local zoning constraints. Americom proposes Sparks, Nevada, as the community of license because it is the closest community to Truckee, and contends that its population of 35,300 is sufficient to support a radio station. Moreover, in its July 28, 1989 response, Americom contends that every community nearer to Truckee consists of nothing "more than a grouping of condominiums, ski areas and a general store." In this connection, however, we note that Americom has failed to provide any evidence to support its contention that the municipalities located between Truckee, California, and Sparks, Nevada, are not licensable communities under Section 307(b).

7. In view of the foregoing, we believe a substantial and material question exists as to whether a transmitter site is available to Americom which would enable it to serve Truckee. Consequently, an appropriate issue will be designated. In the event that Americom meets its burden of establishing that an appropriate transmitter site is not available, then it will not be necessary to adjudicate the 307(b) issue, discussed below.

8. *Section 307(b) Considerations.* In *Ark-Valley Broadcasting Company, Inc.*, 15 FCC 818 (1951), the Commission held that Section 307(b) of the Communications Act must be considered when a licensee seeks to change its community of license.[10] Under a Section 307(b) analysis, the "equitable and efficient factors relevant to any particular proceeding can be determined only with regard to the particular facts of the case, and they must be weighed and balanced to reach an ultimate conclusion as to which applications would best serve the public interest, convenience and necessity." *Kent-Ravenna Broadcasting Co.*, 44 FCC 2603, 2608 (1961). In this regard, we note that the Commission has expressed its concern with respect to the removal of the sole aural transmission service from a community. *See In the Matter of Amendment of the Commission's Rules Regarding FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989); *recon. granted in part and denied in part*, 5 FCC Rcd 7094 (1990). In light of this precedent, we believe a substantial and material question exists as to whether, pursuant to Section 307(b) of the Communications Act of 1934, as amended, grant of the instant application would serve the public interest.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned application (BP-871007AI) is DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether a transmitter site is available to the applicant which would allow the applicant to serve its present community of license.

2. To determine whether, pursuant to Section 307(b) of the Communications Act of 1934, as amended, a grant of the application would provide a fair, efficient, and equitable distribution of radio service.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

10. IT IS FURTHER ORDERED, That the request of Pacific Telecom, Inc. to withdraw the petition to deny filed by Constant Communications of Nevada, Inc. IS GRANTED, to the extent indicated herein.

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reconsideration of the prior modification application which proposed Site 2 for KHTZ(AM)'s transmitter. In that letter, Americom was informed that it had failed to support its showing for a waiver of Section 73.24(j) by documenting the unavailability of sites offering greater coverage than the proposed site. Americom was also informed that it had failed to address other "possible alternatives such as changing community of license." The letter thus noted that Americom had failed to demonstrate that it had examined all the possible alternatives available to it, and the consequences thereto, before requesting a modification which would require a waiver of 47 C.F.R. Sec. 73.24(j). It was not suggested that Americom apply for a change in the community of license of KHTZ(AM) which would result in an abandonment of service to Truckee.

[8] Constant supports this allegation by producing a September 13, 1984 letter from the Nevada County Planning Department to KHTZ(AM) granting KHTZ(AM)'s request to withdraw its application for a 400 foot tower, which would have replaced the 200-foot tower that had previously been approved.

[9] In its reply to Americom's response, Constant states that a tower of only 150 feet would satisfy the coverage requirements of 47 C.F.R. Sec. 73.189(b). An engineering study prepared by the Commission's staff supports Constant's contention.

[10] The Commission explained that Section 307(b) was applicable because "applications for the removal of stations from one community to another in effect constitute alternative requests, one for a new license to operate in a new community, and the other for authority to continue operation at the existing location . . . . Hence, we have a clear case of demand for the station by two communities . . . ." 15 FCC at 820.

11. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof with respect to the foregoing issues is on Americom, a California Limited Partnership.

12. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard, the applicant and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's' rules, in person or by attorney, within twenty (20) days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's rules, give notice of the hearing within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-61

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Adopt
Regulations for Automatic 16 RM-8013
Vehicle Monitoring Systems

NOTICE OF PROPOSED RULE MAKING

Adopted: March 11, 1993; Released: April 9, 1993

Comment Date: June 29, 1993
Reply Comment Date: July 14, 1993

By the Commission: Commissioner Marshall not participating.

I. INTRODUCTION

1. By this Notice, we propose rules that will promote the efficient operation and continuing growth of Automatic Vehicle Monitoring (AVM) systems. These systems, which are now operating under interim rule provisions adopted in 1974,[1] will likely constitute important components of the future Intelligent Vehicle Highway System and tracking of cargo in the trucking, railroad, and maritime industry.[2] AVM systems are used to locate and track vehicles using non-voice methods and to relay information to and from vehicles. This proceeding is responsive to a petition for rule making filed by North American Teletrac and Location Technologies, Inc.,[3] which, through their joint venture with Pactel Teletrac (Teletrac), operates several AVM systems. Based on the record before us,[4] we are persuaded that AVM technology and experience have developed to a point where permanent provisions will further the public interest.

II. BACKGROUND

2. We first visited AVM policies in a *Notice of Inquiry* of August 21, 1968,[5] seeking information on the state of development of such systems and the operational requirements they presented. Acknowledging the existence of several system designs, we decided that systems then under study would require a period of actual operation in a land mobile environment so that we could determine what designs would perform most effectively, what type of demand would exist for such services, and how we could license such systems to best serve the public interest.[6] Hence we instituted an inquiry into AVM technology, providing as well for the authorization of AVM operations on a temporary experimental basis.

3. While our *Notice of Inquiry* elicited a "significant body of data,"[7] these data did not permit conclusive findings and recommendations. Rather, the data indicated on the one hand that AVM technology had not developed sufficiently to justify permanent policies, but on the other that these systems had the potential to accommodate several radio communication requirements, such as tracking fleets of vehicles, monitoring the status of vehicles, and providing service to individuals in emergency situations, that could not be met easily within existing land mobile operations.[8] Hence, four years after our original Notice, we re-instituted our inquiry, seeking information that would aid us in determining whether AVM systems should be authorized on a regular basis.

4. In the summer of 1974, we terminated our inquiry with a *Report and Order* adopting the interim rule now in effect.[9] From the information before us, we concluded that AVM techniques had progressed to a point where systems could be authorized on a routine basis. The *Report and Order* recognized, however, that there are a variety of different methods of locating vehicles including proximity sensing, multilateration and dead reckoning, to serve the differing needs of users.[10] We recognized that all these different methods and uses would need to be accommodated. Accordingly, we chose to adopt interim provisions, envisioning continuous study and development of AVM techniques to define spectrum requirements and operational standards for future action on our part.[11]

5. Development of AVM systems has recently progressed to the point that a number of systems have become viable and are now providing AVM service. Demand has been demonstrated for the wide variety of services that different types of AVM systems are capable of providing,[12] and we anticipate that the demand for AVM services will continue to grow. In 1992, the Private Radio Bureau granted Teletrac a waiver to allow it to provide service on a private carrier basis, to serve individuals, and to locate objects

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[1] Report and Order, Docket No. 18302, 30 RR 2d 1665 (1974) (Report and Order).

[2] In the Intermodal Surface Transportation Efficiency Act of 1991, Congress emphasized the importance of Intelligent Vehicle Highway Systems and provided substantial funding to plan, develop, and deploy concepts and technologies for communications, controls, navigation, and information systems to reduce highway congestion, improve highway safety, and render highway traffic more compatible with the environment. *See generally* reply comments of the Intelligent Vehicle Society of America (IVHS America).

[3] The petition for rule making was filed on May 28, 1992, and designated RM-8013.

[4] In response to our Public Notice, Report No. 1897, released June 23, 1992, 19 comments and 35 reply comments were filed. These parties are listed in Appendix A to this Notice.

[5] *See* Further Notice of Inquiry and Notice of Proposed Rule Making, Docket No. 18302, 35 FCC 2d 692 (1972) (Further Notice).

[6] *Id.* at 692.

[7] *Id.* at 693.

[8] *Id.* at 693-4.

[9] Report and Order, 30 RR 2d 1665 (1974).

[10] *Id.*

[11] *Id.* at 1667, 1672.

[12] *See generally* comments and reply comments filed by AVM users in response to Teletrac's petition offering testimonial of the value of services being rendered by existing AVM systems.

other than vehicles.[13] Teletrac has indicated that a demand exists for locating both animate and inanimate objects as well as for a fleet tracking capability and service to individuals in emergency situations.[14] Additionally, increasing congestion on our nation's highways has led to greater demand for intelligent highway systems that better manage the flow of traffic. With their ability to track large numbers of vehicles and quickly relay information to and from vehicles, AVM systems will play an important role in enabling local governments to implement these intelligent highways. The automated nature of AVM systems will also reduce the cost to government agencies of operating facilities such as toll booths and weighing stations because such facilities will require dramatically reduced staff. Considering the multitude of benefits offered by AVM systems, it is imperative that our rules provide a competitive and dependable environment in which AVM systems can continue to develop.

III. DISCUSSION

6. In seeking permanent rules, Teletrac asserts, and commenters generally agree, that our interim rules by their very uncertainty impede development of and investment in AVM technology. Further, according to Teletrac, current provisions do not take into account the technical capabilities of AVM equipment, do not reflect the full range of services it can provide, and do not consider adequately the question of protection from harmful interference.[15] Again, the comments indicate general agreement with this assessment of our provisions. At the same time, however, they do not agree on the merits of Teletrac's specific solutions to these problems. We consider, in this regard, first the definition of AVM, a subject of little controversy in the record. We then address spectrum allotment and licensing concerns, subjects on which the commenters are far from unanimous in their views.

Eligibility and Permissible Use

7. As discussed above, we believe that there is a growing demand for AVM services not only by businesses and local governments but also by individuals. Accordingly, we propose to expand the types of entities eligible to receive AVM service. Generally, Part 90 licensees may share the use of their facilities only with persons or entities that fall within various specific eligibility categories such as business, emergency organizations, land transportation entities, and state and local government agencies, for example. Individuals ordinarily are not eligible to share the facilities of a Part 90 licensee.[16] We believe, however, that AVM services will be beneficial to the public in general and that providing service to the general public will not compromise a licensee's ability to provide location services to Part 90 eligibles. Accordingly, we propose that Part 90 of the Commission's Rules be amended to permit an AVM licensee to provide service to individuals and the Federal Government as well as to Part 90 eligibles.

8. In addition to expanding the eligibility of end users we believe that the public interest would be served by expanding licensee eligibility to include private carriers. In accordance with Section 90.179 of the Rules, 47 C.F.R. § 90.179, only specialized mobile radio and private carrier paging licensees are permitted to provide service on a for-profit private carrier basis on frequencies above 800 MHz. All other licensees above 800 MHz are only permitted to share facilities on a cost sharing basis. Considering the often extensive infrastructure and high capacity of many AVM systems, we believe that it is appropriate to permit licensees to provide AVM service to others on a private carrier basis. Allowing this will permit licensing of entities with the financial and technological resources to provide state-of-the-art AVM services and will permit many individuals and smaller organizations that would be unable to support the cost of constructing a dedicated AVM system to obtain AVM service. Accordingly, we propose to expand licensee eligibility for AVM systems to include private carriers.

9. AVM systems are now limited to locating vehicles and to transmitting status and information related to the vehicles involved.[17] Petitioner and commenters wish to expand this definition to include the location of all objects, animate as well as inanimate.[18] We agree that the public benefit from position location systems would be greatly enhanced by permitting a wider variety of permissible uses. Accordingly, we propose to rename the AVM service as the Location and Monitoring Service (LMS) service and to define LMS as follows:

> The use of non-voice signalling methods from and to radio units to make known the location of such units. LMS systems may also transmit and receive status and instructional messages related to the units involved.

This definition will give licensees the flexibility to use LMS systems to monitor or locate any object and will greatly expand the potential uses for such systems.[19] Our expansion of permissible use and eligibility may, however, have its drawbacks. Increasing the potential uses for LMS services could lead to rapid congestion of available spectrum. We request comment on this proposal and on whether LMS systems and other entities currently occupying the 902-928 MHz band (*see* n.24) will be capable of handling any increased congestion.

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[13] Letter dated June 5, 1992, from the Chief, Private Radio Bureau to John B. Richards, Esq.

[14] Teletrac petition at 6-14.

[15] Petition at 15-19.

[16] *See* Report and Order, PR Docket No. 86-404, 3 FCC Rcd 1838, 1840 (1988). *See also* Report and Order, PR Docket No. 89-45, 6 FCC Rcd 542 (1991).

[17] *See* 47 C.F.R. §§ 90.7 and 90.239.

[18] Petition at 20. Location Services (LS) comments at 5. MobileVision comments at 8. Southwestern Bell Corporation (SBC) comments at 2-4.

[19] In its comments, MobileVision states that the last sentence of this definition should be eliminated, claiming that it is redundant with operational requirements of AVM systems in 47 C.F.R. § 90.239. *See* MobileVision comments at 15. We disagree. The second sentence makes it clear that the transmission of information not directly related to locating an object is permissible, but that such transmissions must be limited to those related to objects being monitored or located. This should alleviate Amtech's concerns that the forward links operated as part of some AVM systems could potentially be used for purposes not connected with AVM. Amtech comments at 43. *See* para. 17, *infra*.

The 902-928 MHz Band

1. Spectrum Allotment/Licensing

10. How LMS spectrum in the 902-928 MHz band should be allotted is the subject of much contention in the comments. The interim rules divide the 902 928 MHz band into four sub-bands for AVM operation.[20] The 904-912 MHz and 918-926 MHz bands are assigned to licensees with AVM systems requiring up to eight megahertz.[21] The other two bands, at 903-904 MHz and 926-927 MHz, are licensed only on a developmental basis for narrow-band type systems[22] and to date there has been very little licensing activity in these bands. A number of licenses have, however, been granted on a non-exclusive basis in the 904-912 MHz and 918-926 MHz bands for both wide and narrow-band type systems.[23] These licenses have been granted without regard to the compatibility of co-channel systems, the method of operation of the AVM systems, or the operating bandwidth of the individual systems.[24]

11. One form of AVM system currently operating in the 904-912 MHz and 918-926 MHz bands is the pulse-ranging multilateration system. In this type of system, a wide-band (up to eight megahertz) pulse is transmitted from the unit the licensee wishes to locate. The pulse is received at a number of fixed receiver locations. The difference in the time of arrival of the pulse at the various fixed locations is then used to calculate the location of the vehicle.[25] Various narrow-band systems are also operating in the 904-912 and 918-926 MHz bands.[26] In one of these types of systems an electronic device, generally referred to as a tag, is placed in or affixed to the object to be located. When the object passes near one of the system's stations, the station transmits an interrogating signal. The interrogating signal is either modulated with unit-specific information and reflected back to the station's receiver or the tag transmits its own signal in response to the interrogation. With either the pulse-ranging or narrow-band systems, status information or instructions can be transmitted to and from the unit being monitored or located. Generally, the pulse-ranging multilateration systems transmit a wide-band signal that is from 4 to 8 megahertz wide, while narrow-band systems use a signal that is generally tens or hundreds of kilohertz wide.

12. The petitioner and most commenters operating or developing wide-band pulse-ranging systems argue that current practice, which permits narrow-band systems on the same spectrum as pulse-ranging systems, is unacceptable.[27] These commenters contend that the accuracy of a wide-band pulse-ranging location system is inversely proportional to the amount of co-channel noise in the system's vicinity. Although pulse-ranging systems are able to tolerate a limited amount of co-channel noise and still accurately locate objects, commenters claim, the narrow-band AVM systems currently being licensed raise this noise to intolerable levels and can render all or part of a pulse-ranging system useless.[28] Accordingly, these commenters seek to have narrow-band systems licensed on spectrum other than that used by wide-band pulse-ranging systems.[29]

13. Commenters operating or developing narrow-band systems and one commenter that is developing a wide-band pulse-ranging system dispute these claims.[30] According to these commenters, it is only because of deficiencies in the design of most pulse-ranging systems that the systems can tolerate only a very limited amount of noise.[31]

14. Our review of this issue suggests that co-channel noise in the vicinity of a wide-band pulse ranging system does make it difficult, if not impossible, for the system to operate effectively. While we realize that there may be a number of ways to overcome at least a limited increase in co-channel noise, at this time we believe that these are generally not reasonable or cost-effective solutions. Accordingly, we propose that narrow-band LMS systems not be licensed on the bands currently occupied by wide-band pulse ranging LMS systems.

15. As stated previously, Section 90.239 permits licensing LMS systems on 18 megahertz of the 26 megahertz in the 902-928 MHz band.[32] We propose to license LMS systems in the entire band. We propose that all narrow-band systems be licensed in the bands 902-904, 912-918, and 926-928 MHz and that all wide-band pulse-ranging systems

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[20] *See* Section 90.239(c), 47 C.F.R. § 90.239(c).

[21] *See* Section 90.239(c)(1).

[22] Section 90.239(c)(2).

[23] Some waivers have also been granted to operate systems in the 912-918 MHz band.

[24] AVM systems operate on a secondary basis to Federal Government users and must also accept interference from Industrial, Scientific, and Medical devices. *See* 47 C.F.R. 90.239(c)(ii). Additionally, there are a number of users in this band that operate on a secondary basis to AVM operations. *See*, paras. 23 and 24 *infra*.

[25] The wide-band pulse can also be transmitted from the fixed locations in which case the time of arrival calculations would be performed by the units to be located.

[26] Amtech operates AVM systems that would be categorized as narrow-band. Amtech argues, however, that categorizing systems as narrow-band and wide-band is not appropriate. Amtech comments at 22. In using these broad categorizations we do not judge that one type of system is superior to another. We do believe, however, that in this instance, broadly classifying systems as either wide-band or narrow-band is necessary for licensing the different forms of LMS systems in a way that will allow them to co-exist in the 902-928 MHz band.

[27] *See*, Teletrac petition at 20-28, MobileVision comments at 9-14, LS comments at 3 and 4, and SBC comments at 3-6.

[28] *See*, Teletrac petition, Appendix 2, *Impact of Co-channel Interference on 900 MHz Wideband Pulse-Ranging AVM Systems*. *See also*, Mobilevision comments, Attachment A.

[29] The petitioner contends that the Commission always intended that AVM systems would be licensed on an exclusive basis, implying that the Licensing Division has erred in licensing systems on a non-exclusive basis. Petition at 20-24. We do not find sufficient evidence in any of the Commission's past proceedings or in the interim rules to support this claim. The interim rules were adopted at a time when very little information was available on AVM systems, including the demand for such services, or on the eventual technology that would be used to provide these services. The interim rules were, therefore, intended to promote the technological and marketplace development of AVM systems in general and to provide an environment of experimentation. To this end we believe that our licensing methods have reflected this intent. Additionally, at the time the interim rules were adopted there were no licenses being granted on an exclusive basis in the private land mobile services. Exclusive licenses were not adopted until May, 1974, in PR Docket 18262, 46 FCC 2d 752 (1974) and there is no evidence in the Report and Order that the Commission was contemplating applying such a new concept to the AVM service.

[30] *See* Pinpoint comments at 9-19, Amtech comments at 22-43, and Interagency comments at 6-8.

[31] *Id.*

[32] para. 8 *supra*.

be licensed in the bands 904-912 and 918-926 MHz. Because this spectrum is allocated on a primary basis for use by the Federal Government it will be necessary to coordinate use of the 902-903, 912-918, and 927-928 MHz bands for the LMS with the National Telecommunications and Information Administration (NTIA) prior to adoption of final rules.[33]

16. With respect to the status of existing narrow-band systems in the 904-912 and 918-926 MHz bands, some commenters support grandfathering these systems,[34] while others argue that narrow-band systems not operate on spectrum used by wide-band pulse-ranging systems.[35] Given our proposed licensing scheme and the difficulties that wide-band pulse-ranging systems have co-existing with narrow-band systems, we believe it preferable to require narrow-band systems to migrate to the bands being proposed for their use. Accordingly, we propose that licensees currently authorized to operate narrow-band systems in either the 904-912 or 918-926 MHz bands be required top relicense their systems to operate on other spectrum within three years from the effective date of the Report and Order in this proceeding. We request comment on this proposal and, in particular, on the difficulties that existing narrow-band systems would encounter if required to move to different frequencies.

17. We also invite comment proposing alternative licensing schemes. For instance, if it is not possible to obtain authorization from NTIA to use the additional spectrum, is there a method wherein wide-band pulse ranging systems can effectively co-exist with narrow-band systems? Commenters are asked to discuss the maximum acceptable levels of co-channel noise for a shared environment and methods to limit noise to this acceptable level. In the alternative, it may be possible to restrict narrow-band transmissions to certain frequencies within the eight megahertz segments, thereby minimizing interference to the wide-band licensees. Additionally, commenters should address whether pulse-ranging LMS systems require eight megahertz and, if not, what minimum amount of spectrum is necessary to operate such a system.[36] Commenters should also address whether the amount of spectrum being proposed for narrow-band systems is sufficient to accommodate the future uses of these systems. The technology being used in AVM systems today is quite advanced and we would expect that licensees dedicated to operating cooperatively in a shared environment would be able to propose a method by which productive co-channel operations can be achieved. We therefore remain open to the possibility of an alternative licensing method.

2. Spectrum Allocation for Wide-Band Systems

18. If the 904-912 MHz and 918-926 MHz bands are reserved for wide-band pulse-ranging systems, we must determine which systems qualify for licensing. While we could, for example, require systems licensed in these bands to utilize the entire eight megahertz, we believe that a somewhat more flexible approach may be appropriate to promote efficient spectrum use. Accordingly, we propose that only pulse-ranging LMS systems having a bandwidth of at least two megahertz be licensed in the 904-912 MHz and 918-926 MHz bands. Systems requiring less than two megahertz would be licensed in the 902-904, 912-916, and 926-928 MHz bands. We request comment on this proposal and on whether any other limits, or no limits, would be preferable. We also note that the 2450-2483.5 MHz band is available for narrow-band systems and many are already designed to use that band.[37]

19. Commenters indicate that wide-band pulse-ranging LMS systems require spectrum to contact units to be located (this is commonly referred to as a forward link).[38] Consistent with systems that are currently operating,[39] we propose that LMS systems operating in the 904-912 and 918-926 MHz bands be authorized to use 250 kHz of spectrum to establish forward links as follows: licensees in the 904-912 MHz band would use 924.890-925.140 MHz and licensees in the 918-926 MHz band would use 904.375-904.625 MHz. These links could be used only in conjunction with units being located, but no other limits would be placed upon them. Licensees would be able to divide the 250 kHz as required to satisfy their needs.

20. We request comment on our proposal for forward links, including whether it would be better to move the forward links to the edges of the 8 MHz bands,[40] or whether a licensee should use the forward links located in its own eight megahertz band rather than using the forward link channels that are located in the other eight megahertz band.

3. Licensing of Wide-band Systems

21. We have proposed that only wide-band pulse ranging LMS systems be licensed in the 904-912 MHz and 918-926 MHz bands. The petitioner and some commenters claim that such systems must be licensed on an exclusive basis (one licensee per band in any one geographic area) to operate effectively and to promote further development of

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[33] Additionally, Radian Corp. has filed a petition for rule making, RM-8092, requesting that the 914-916 MHz band, later amended to 908.75-912.25 MHz (*see* NOI at n.6), be allocated on a secondary basis to government radiolocation services for non-government wind profiler radar systems. *See*, Notice of Inquiry, Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum for Wind Profiler Radar Systems, (NOI), ET Docket 93-59, on this issue was adopted March 10, 1993. Any Commission action in response to RM-8092 will take into consideration spectrum and licensing requirements that will be adopted in this proceeding.

[34] Teletrac petition at 35. MobileVision comments at 17 and 18. SBC suggests that more information on the effect of grandfathering any systems is required. SBC comments at 6.

[35] LS comments at 4.

[36] MobileVision has been especially adamant that pulse-ranging systems require the full eight megahertz while SBC has suggested that smaller assignments would be acceptable. MobileVision comments at 13. SBC comments at 3.

[37] *See*, 47 C.F.R. § 90.75. Private land mobile use of this band is not, however, limited to LMS systems and LMS systems operating in this band would not be able to take advantage of the expanded licensee and end user definitions we are proposing herein. *See* paras. 7-9 *supra*.

[38] Teletrac petition at 21 and 22. SBC comments at 4. MobileVision comments at 14. LS comments at 4 and 5. Pinpoint agrees that a forward link is necessary but disagrees that separate dedicated spectrum is required. Pinpoint claims that its AVM system incorporates a forward link in the same channel used for vehicle location and that other AVM licensees should also be required to do so. Pinpoint comments at 20-22.

[39] *See* Teletrac petition at 20-22.

[40] LS supports locating the forward links at the edges of the bands. LS comments at 4.

the LMS industry.[41] The record does not appear to support this view. As IVHS America points out, the exclusive use of 8 MHz-wide assignments will lead to a higher cost to the public both in terms of use of the spectrum and in terms of cost for subscribing to an LMS service (because of decreased competition).[42] We believe it possible for wide-band pulse-ranging systems to operate on a non-exclusive basis, albeit with cooperation among co-channel licensees serving the same area. We further believe that non-exclusive licensing of LMS systems is the best means to promote competition within the LMS industry and continued technological advances in LMS services, possibly leading to more robust systems and more efficient spectrum sharing. If we were to grant exclusive licenses in these bands, we might effectively eliminate any further entrants into LMS services in these bands in many areas of the country because of the extensive number of licenses currently issued, ultimately resulting in limiting the number of licensees to two in all areas of the country.[43]

22. Assuming that sharing of this spectrum is feasible, we have developed two possible approaches to future licensing. One approach would be to license wide-band pulse ranging systems on a non-exclusive basis in the 904-912 and 918-926 MHz bands assuming we determine sharing is *immediately* feasible. Under this approach coordination to avoid interference among co-channel users would be performed by the licensees themselves. Under another approach, we could take steps to protect licensees that are currently authorized in the 904-912 and 918-926 MHz bands or in the markets not currently licensed, protect the first two wide-band licensees for five years. Specifically, we could continue to license stations on the 904-912 and 918-926 MHz bands but require all new applicants for these bands, after the effective date of a Report and Order in this proceeding, to be located at least 110 miles from all previously licensed, co-channel stations.[44] After a five-year period, licenses could be granted for wide-band systems on a non-exclusive basis and with no co-channel mileage separation. Licensees issued authorizations after the five-year period would, however, be required to protect any previously licensed co-channel wide-band stations.[45] We request comment on our proposals and invite alternative proposals that commenters believe would better serve the public interest and provide for competition and development within the LMS industry.

23. While it may be necessary for co-channel licensees to coordinate among themselves to enable effective wide-band sharing, there are also additional users of this band that must be considered. The primary allocation for the 902-928 MHz band is for Federal Government Radiolocation, Fixed and Mobile services;[46] additionally, LMS systems must accept interference from Industrial, Scientific, and Medical (ISM) devices under Part 18 of the Commission's Rules.[47] On a secondary basis to LMS systems, this band is also/allocated for use by unlicensed devices under Part 15 of the Commission's Rules,[48] as well as by amateur radio operations in accordance with Part 97 of the Rules.[49] Commenters have indicated that, thus far, interference received from government radar systems or ISM equipment has not been a problem. Licensees, however, must remain aware that such interference from the primary services is possible and, as LMS systems become more prevalent, that the possibility of interference will increase.

24. In contrast, however, interference to LMS systems from Part 15 users, amateur operators, and Government Radiolocation, Fixed and Mobile stations is a more likely scenario that must be addressed. Some LMS systems have already experienced interference from Part 15 devices. This will likely be a continual concern as new consumer-oriented Part 15 devices, including the new spread spectrum cordless telephones, which can operate with up to one watt, are introduced.[50] Although such devices operate on a secondary basis to LMS systems, LMS licensees could require some time to identify a source of interference and take action to eliminate the problem. As LMS systems are being marketed to public safety entities such as police and ambulance services, this potential interference is of special concern.[51] We request comment from LMS operators regarding measures that should be taken to protect against potentially life-threatening failures of LMS systems due to interference from other, lower priority users of the band. Of particular interest are measures that have already proven effective in preserving the reliability of LMS systems. One measure that we propose is to alert LMS customers to the possibility of such interference, and its effect on service quality or reliability, by requiring that all, instruction manuals, operator manuals, and brochures for LMS devices sold have a warning similar to that required for Part 15 devices in accordance with Section 15.19(a)(3) of our Rules, 47 C.F.R. § 15.19(a)(3). Our proposed warning reads as follows:

> "This device complies with Part 90 of the FCC Rules. Operation is subject to the following two conditions: (1) this device may not cause harmful interference to Federal Government operations using this spectrum and (2) this device must accept any interference re-

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[41] Teletrac petition at 24-32. MobileVision comments at 10 and 11. LS comments at 3.

[42] Reply comments of IVHS America.

[43] A number of commenters have raised this issue. *See* Pinpoint comments at 22-25 and Amtech comments at 37-40.

[44] In some areas co-channel systems that are already licensed will be separated by less than 110 miles. In such situations the licensees will be required to share on an equal basis.

[45] We emphasize that any entities granted a license to operate on the 904-912 or 918-926 MHz bands after the adoption date of this Notice of Proposed Rule Making and prior to the effective date of a Report and Order in this proceeding will be required to construct and place their system in operation within 8 months of the date the license is granted, as currently required by Section 90.155 of our Rules.

[46] *See* Section 2.106, 47 C.F.R. § 2.106.

[47] *See* Section 18.305, 47 C.F.R. § 18.305.

[48] *See* Sections 15.247, 15.243, 15.245, and 15.249, 47 C.F.R. §§ 15.247, 15.243, 15.245, and 15.249.

[49] *See* Section 97.301, 47 C.F.R. § 97.301.

[50] *See* Section 15.247, 47 C.F.R. § 15.247. Cylink Corporation (Cylink), a developer of Part 15 equipment, submitted late-filed comments on February 8, 1993, regarding the co-existence of Part 15 devices and AVM systems. Cylink provides a copy of a letter sent by Teletrac to one of Cylink's customers informing the customer of interference its Part 15 device is causing to Teletrac's AVM system, and informing the customer that it must remove the device from the 904-912 MHz band. Cylink contends that such interference will become more routine in the future and asserts that the Commission should take action to provide Part 15 users greater rights when operating in the 902-928 MHz band.

[51] *See* petition at 12-15.

ceived from Federal Government operations and from Industrial, Scientific, and Medical devices using this spectrum, including interference that may cause undesired operation."

Commenters should address whether they believe it possible to establish reliable LMS systems considering the number and diversity of other users of this band. If not, commenters should offer potential solutions, such as removing Part 15 users and amateur operations from the band, restricting where such users could operate in the band, or placing stricter limitations on the operation of such users in this band.

4. Narrow-Band Licensing

25. We propose that narrow-band LMS systems (any system licensed in the 902-904, 912-918, 926-928 MHz bands) also be licensed on a nonexclusive basis, with coordination performed by the licensees to avoid interference. Some commenters operating and developing narrow-band systems claim that their systems are more robust than are wide-band systems and are therefore not as susceptible to interference.[52] We thus propose that no restrictions be placed on the type or number of systems operating in these bands. We request comments on this proposal and whether, in the alternative, some form of restriction is appropriate. Because these systems are also subject to the interference concerns discussed above, we request comment on whether some form of warning to consumers should be required for narrow-band LMS systems.

5. Construction Period

26. Currently, LMS licensees must construct and place their systems in operation within eight months from the date the license is granted.[53] The petitioner and some commenters support extended implementation schedules for LMS systems that employ numerous base stations and receive sites.[54] Except for local government entities.[55] we currently have no provision for extended implementation of radio systems that operate on shared channels, and we are not inclined to introduce such a concept in this service.[56] We do not believe that systems operating on shared spectrum require an extended period to construct their facilities. Because the channels are shared, a licensee need not apply at the outset for all the facilities it intends to construct. Rather, it can apply when it is ready to begin construction on an individual facility. Further, we do not want frequencies to appear more congested than they really are because of licensees that do not construct. If we grant extended implementation, unconstructed licenses could remain active for up to five years rather then being cleared from the database after eight months. Accordingly, we propose to retain the eight month construction and placed in operation requirement.

LMS Below 512 MHz

27. Section 90.239, 47 C.F.R. 90.239, provides for LMS systems on frequencies below 512 MHz. We have not received any comments regarding such systems. We propose that no changes be made to the rules regarding LMS systems below 512 except that our proposed definition for LMS would apply there as well. Such licensees would not, however, be permitted to provide service to individuals or to provide service on a private carrier basis. We believe such a restriction is appropriate in bands below 512 MHz given their primary use as private land mobile communication channels, not for radiolocation purposes. We request comment on this proposal and on any changes that might be appropriate for LMS systems operating in these lower bands.

Technical Requirements

28. Currently, transmitters used in LMS systems above 512 MHz do not have to be type accepted, provided that they meet the technical requirements of Section 90.239(e)(2).[57] Several commenters support requiring that equipment used for LMS systems be type accepted.[58] LS states, however, that such a requirement would be prohibitive for licensees in the early stages of equipment development and requests that licensees be permitted to operate new systems for 18 months before they are required to get their equipment type accepted.[59]

29. In that we are proposing permanent rules for LMS systems, we believe that equipment should receive type acceptance prior to use. As LMS systems become more wide spread, and because such systems will be licensed on a nonexclusive basis, it will be increasingly important to LMS licensees and users that new equipment comply with required technical standards. Accordingly, we propose to require that LMS equipment be type accepted prior to marketing and use.[60]

30. We propose a number of technical requirements for LMS systems to minimize the possibility of both co-channel and adjacent-channel interference. We propose that no restriction be placed on the type of emission that can be authorized for LMS operation in the 902-928 MHz band.[61] We propose bandwidth limits as follows:

for 904-912 and 918-926 MHz -- maximum 8 MHz
for 902-904 and 926-928 MHz -- maximum 2 MHz
for 912-918 MHz -- maximum 6 MHz.

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[52] Amtech comments at 10 and 36.

[53] *See* Section 90.155, 47 C.F.R. § 90.155.

[54] Teletrac petition at 33. MobileVision comments at 16.

[55] *See* Section 90.155(b), 47 C.F.R. § 90.155(b).

[56] Any waivers granted by the Licensing Division to permit extended implementation will, however, remain in effect. Pending a Report and Order in this proceeding, we do not anticipate granting any new waivers of the eight-month construction requirement absent extraordinary circumstances. Additionally, because of the scope of this proceeding all AVM licensees should be aware that final rules adopted may require any licensee, regardless of the type of system of frequencies that the system operates on, to modify its operations.

[57] *See* 47 C.F.R. § 90.239(e)(2).

[58] Teletrac petition at 17. MobileVision comments at 14.

[59] LS comments at 2.

[60] Licensees still in the developmental stages that do not wish to seek type acceptance may be licensed on a developmental basis in accordance with subpart Q of Part 90 of our Rules. 47 C.F.R. Part 90 Subpart Q.

[61] *See* Section 2.201 of the Rules, 47 C.F.R. § 2.201, for a description of emission designators.

We propose the frequency tolerance for transmitters in the 904-912 and 918-926 MHz bands to be 0.0005 percent and that no minimum frequency tolerance be established for transmitters in the 902-904, 912-918, and 926-928 MHz bands. The frequency tolerance for these systems would be specified on the station's authorization. We propose a maximum peak effective radiated power for any LMS systems operating in the 902-928 MHz band of 300 watts. Finally, we propose that emissions anywhere within the authorized bandwidth not be required to be attenuated but that any emissions outside of the authorized bandwidth be attenuated by at least 55 + 10log(P) dB where P is the highest emission (in watts) of the transmitter inside the authorized bandwidth. We request comment on the proposed technical limitations, especially, whether it would be appropriate to require that systems, particularly wide-band systems operating in the 904-912 and 918-926 MHz bands, evenly distribute power throughout their authorized band. If such a requirement is appropriate commenters should be specific as to how such a requirement should be implemented. Additionally, comments are specifically sought on whether a frequency tolerance should be specified for narrow-band systems and, if so, what the frequency tolerance should be.

IV. CONCLUSION

31. We propose rules for the LMS service that will replace interim rules now in effect. We propose, first of all, to expand the service to encompass location of all objects, animate and inanimate, and to allow licensees to provide service on a private carrier basis to individuals, the Federal Government, and Part 90 eligibles. Further, we propose locating wide-band pulse-ranging LMS services in the 904-912 MHz and 918-926 MHz bands, and narrow-band LMS services in the 902-904 MHz, 912-918 MHz, and 926-928 MHz bands. All licensees would operate on a shared-frequency basis and would be expected to cooperate with other licensees to resolve any harmful interference. Narrow-band licensees currently operating on frequencies designated for wide-band use would have to relocate their systems within three years of the effective date of our final action. The proposed rules will foster continued development of the LMS service, while maintaining an open and competitive marketplace. LMS services will greatly benefit the public interest by promoting more intelligent use of our nation's highways and more efficient use of scarce resources.

V. PROCEDURAL MATTERS

Regulatory Flexibility Act

32. An Initial Regulatory Flexibility Analysis is contained in Appendix B to this *Notice of Proposed Rule Making*. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

Ex Parte Rules - Non-Restricted Proceeding

33. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Comment Dates

34. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **June 29, 1993,** and reply comments on or before **July 14, 1993**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, DC 20554.

Ordering Clause

35. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i), 302, 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 302, 303(g), 303(r), and 332(a).

Contact Person

36. For further information concerning this proceeding, contact Steve Sharkey, Private Radio Bureau, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Comments

1. Allen-Bradley Company, Inc.
2. American President Company
3. American Trucking Association
4. Amtech Corporation
5. Amtech Logistics Corporation
6. Association of American Railroads
7. Conrail
8. Greater New Orleans Express
9. Location Services
10. Los Angeles County Office

11. Los Angeles Dept. of Airports
12. LTV Missile Group
13. Mark IV IVHS Division
14. Mobilevision
15. Niles Police Department
16. Oklahoma Turnpike Authority
17. Pinpoint Communications, Inc.
18. Riverside Transit Agency
19. Southwestern Bell Corp.

Parties Filing Reply Comments

1. Ambulance Service Corp.
2. Amtech Corporation
3. Bedford Motor Service
4. CCTC International Inc.
5. City Haul, Inc.
6. City of Evanston Police
7. City of Farmington Hills
8. City of Santa Monica California
9. Core-Mark
10. Courtesy Services
11. Dependon Messenger and Trucking
12. GTECH Corporation
13. Intelligent Vehicle Highway Society of America
14. Jewel Food Stores
15. Location Services
16. Los Angeles Bureau of Investigations
17. Los Angeles County Office of Education
18. Mark IV IVDS Division
19. Mercy Ambulance Service
20. Michigan Department of Police
21. Missile Group Old Crows
22. Mobilevision
23. North American Teletrac
24. North Richland Hills Police
25. Oak Lawn Police
26. Oakland County Sheriff's
27. Paramed Inc.
28. Pinpoint Communications
29. Progressive Concepts, Inc.
30. Riverside Transit Agency
31. Rolling Meadows Police
32. Solon Automated Services
33. Southern Wine & Spirits
34. Southwestern Bell Corp.
35. Wrag-Time

Parties Filing Late-Filed Comments

1. Cylink Corporation
2. Stanford Telecommunications, Inc.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. *Reason for Action:* The changes, proposed herein, to Part 90 of the Commission's Rules will enhance use of the 902-928 MHz band for automatic vehicle monitoring (AVM) systems. The proposed permanent rules will replace the existing interim rules, thereby creating a more stable environment for AVM systems to operate in. This should lead to investment in AVM technology a development and implementation of new AVM systems.

2. *Objectives:* The Commission seeks to promote development of a competitive and innovative AVM service in the 902-928 MHz band. Such a service will provide valuable new advanced location options to the public.

3. *Legal Basis:* The legal basis for these rule changes is found in Sections 4(i), 302, 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 302, 303(g), 303(r), and 332(a).

4. *Reporting, Recordkeeping, and Other Compliance Requirements:* AVM licensees will be required to have equipment type accepted prior to its use. Additionally, some licensees currently operating AVM systems in the 904-912 and 918-926 MHz bands will be required to relicense their systems in the 902-904, 912-918, or 926-928 MHz bands.

5. *Federal Rules Which Overlap, Duplicate or Conflict With These Rules:* None.

6. *Description, Potential Impact, and Number of Small Entities Involved:* Many small entities could be positively affected by this proposal because additional AVM options would be made available to them. The number of small entities that will be affected is unknown. Additionally, expanded service opportunities will generate a demand for new AVM equipment, a benefit for equipment manufacturers.

7. *Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:* This Further Notice solicits comments on a variety of alternatives. Additionally, all significant alternatives presented in response to the petition for rule making have been addressed in this *Notice of Proposed Rule Making.*

APPENDIX C

A. Part 2 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for Part 2 continues to read as follows:

Authority: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.106 is amended by adding "Private Land Mobile (90)" to the FCC use designators in the row for 902-928 MHz in the table and by revising footnotes US218 and US275 to read as follows:

§ 2.106 Table of Frequency Allocations

* * * * *

International table	United States table		FCC use designators	
* * *	Government	Non-Government	Rule part(s)	Special-use frequencies
		* * * * *		
* * *	902-928 RADIOLOCATION	902-928	Private Land Mobile (90). Amateur (97).	915 ± 13 MHz Industrial, scientific, and medical frequency.
	707 US215 US218 US267 US275 G11 G59	707 US215 US218 US267 US275		

* * * * *

US218 The band 902-928 MHz is available for Location and Monitoring Service (LMS) systems subject to not causing harmful interference to the operation of all Government stations authorized in these bands. These systems must tolerate interference from the operation of Industrial, scientific, and medical (ISM) devices and the operation of Government stations authorized in these bands.

US275 The band 902-928 MHz is allocated on a secondary basis to the amateur service subject to not causing harmful interference to the operations of Government stations authorized in this band or to Location and Monitoring Service (LMS) systems. Stations in the Amateur service must tolerate any interference from the operations of industrial, scientific, and medical (ISM) devices, LMS systems and the operations of Government stations authorized in this band. Further, the Amateur Service is prohibited in those portions of Texas and New Mexico bounded on the south by latitude $30^{0}41'$ North, on the east by longitude $104^{0}11'$ West, and on the north by latitude $34^{0}30'$ North, and on the west by longitude $107^{0}30'$ West; in addition, outside this area but within 150 miles of these boundaries of White Sands Missile Range the service is restricted to a maximum transmitter peak envelope power output of 50 watts.

* * * * *

B. Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 90.7 is amended by removing the entry for *Automatic Vehicle Monitoring* and adding a new definition for *Location and Monitoring Service* to read as follows:

§ 90.7 Definitions.

* * * * *

Location and Monitoring Service (LMS). The use of non-voice signalling methods from and to location units to make known the location of such units. LMS systems may also transmit status and instructional messages related to the units involved.

* * * * *

3. Section 90.101 is revised to read as follows:

§ 90.101 Scope.

The Radiolocation Service accommodates the use of radio methods for determination of direction, distance, speed, or position for purposes other than navigation. Rules as to eligibility for licensing, permissible communications, frequency available, and any special requirements are set forth in sections 90.103 and 90.105.

4. Section 90.103 is amended by adding 902-928 MHz to the Table in paragraph (b), by adding new paragraph (c)(31), by removing paragraph (d) and by redesignating existing paragraph (e) as paragraph (d) to read as follows:

§ 90.103 Radiolocation Service.

* * * * *

(b) * * *

Radiolocation Service Frequency Table

Frequency or band	Class of Station	Limitation
* * * * *		
Megahertz:		
* * *		
902 to 928	do	31
* * * * *		

(c) * * *

(31) The 902-928 MHz band is available for LMS operations in accordance with section 90.105. Operations will not cause interference to government stations which operate in these bands and must tolerate interference from industrial, scientific, and medical (ISM) devices and from government stations which operate in these bands.

* * * * *

5. A new Section 90.105 is added to subpart F to read as follows:

§ 90.105 Location and Monitoring Service

(a) These provisions authorize the licensing of systems in the location and monitoring service (LMS). LMS systems utilize nonvoice radio techniques to determine the location and status of radiolocation units. LMS licensees authorized to operate a system in the 902-928 MHz band may serve individuals, federal government agencies and entities eligible for licensing in Part 90.

(b) Frequencies for LMS operations are assignable as follows:

(1) Only LMS systems using pulse-ranging technology requiring at least 2 MHz but not more than 8 MHz bandwidth will be authorized in the 904-912 MHz and 918-926 MHz bands. Such systems will be licensed subject to the following conditions:

(i) A licensee authorized a station on either 8 MHz band will not be authorized a station on the other 8 MHz band if the station to be authorized is located within 64 km (40 miles) of a station authorized to the licensee on the first band.

(ii) Operations will not cause interference to government stations which operate in these bands and must tolerate interference from industrial, scientific, and medical (ISM) devices and from government stations which operate in these bands.

(iii) Licensees operating in the 904-912 MHz band are authorized to operate in the 924.890-925.140 MHz band and licensees operating in the 918-926 MHz band are authorized to operate in the 904.375-904.625 MHz band for the purpose of communicating with units being located.

(2) LMS systems not eligible for licensing in the 904-912 MHz and 918-926 MHz bands will be licensed in the 902-904, 912-918, and 926-928 MHz bands. Operations will not cause interference to government stations which operate in these bands and must tolerate interference from industrial, scientific, and medical (ISM) devices and from government stations which operate in these bands.

(3) Applicants requiring not more than 25 kHz bandwidth per frequency in the 25-50 MHz, 150-170 MHz, and 450-512 MHz bands may either utilize base-mobile frequencies presently assigned the applicant, or be assigned base-mobile frequencies available in the service in which eligibility has been established, provided that:

(i) For transmission between vehicles and base stations, each frequency in a single-frequency mode of operation will provide location data for approximately 200 vehicles, or both frequencies in a two-frequency mode of operation will provide location data for approximately 400 vehicles, except that for frequencies in the 450-512 MHz band that are assigned in pairs in accordance with the allocation plan for the band, the requirement is that location data be provided for approximately 200 vehicles for each frequency pair; and a showing is made that 50 percent of the vehicles will be in operation within the system by the end of the second year of the initial license term, and 70 percent will be in operation within the system by the end of the initial license term; except that if these vehicle loading standards will not be met, frequencies will be assigned only on a secondary noninterference basis to any authorized radiotelephony operation.

(ii) The minimum separation between a proposed LMS station and the nearest co-channel base station of another licensee operating a voice system is 75 miles (120 km) for a single frequency mode of operation or 35 miles (56 km) for a two-frequency mode of operation. Where the minimum mileage separation cannot be achieved, agreement

to the use of F1D, F2D, G1D, G2D or P0N emission must be received from all existing co-channel licensees using voice emissions within the applicable mileage limits. If there is interference with voice operations and required agreement was not received, or operation was authorized on a secondary noninterference basis, the licensee of the LMS system is responsible for eliminating the interference.

(iii) Frequencies additional to any assigned under paragraph (b)(3)(i) of this section will not be assigned to the same licensee at any stations located within 64 km (40 miles) of any station in which the licensee holds an interest until each of such licensee's frequencies for LMS operation is shown to accommodate not less than 90 percent of the frequency loading requirements specified in paragraph (b)(3)(i) of this section.

(c) Each application to license an LMS system shall include the following supplemental information:

(1) A detailed description of the manner in which the system will operate, including a map or diagram.

(2) For wide-band frequency operation, the necessary or occupied bandwidth of emission, whichever is greater.

(3) The data transmission characteristics as follows:

(i) The vehicle location update rates;

(ii) Specific transmitter modulation techniques used;

(iii) For codes and timing scheme: A table of bit sequences and their alphanumeric or indicator equivalents, and a statement of bit rise time, bit transmission rates, bit duration, and interval between bits;

(iv) A statement of amplitude-versus-time of the interrogation and reply formats, and an example of a typical message transmission and any synchronizing pulses utilized.

(4) A plan to show implementation schedule during the initial license term.

(d) LMS stations are exempted from the identification requirements of § 90.425; however, the Commission may impose automatic station identification requirements when determined to be necessary for monitoring and enforcement purposes.

(e) All instruction manuals, operator manuals, and brochures for an LMS device must display the following warning:

> This device complies with Part 90 of the FCC Rules. Operation is subject to the following conditions: (1) this device may not cause harmful interference to Federal Government operations using this spectrum and (2) this device must accept any interference received from Federal Government operations and from Industrial, Scientific, and Medical devices using this spectrum, including interference that may cause undesired operation.

6. Section 90.179 is amended by revising paragraph (f) to read as follows:

§ 90.179 Shared use of radio stations.

* * * * *

(f) Above 800 MHz, shared use on a for-profit private carrier basis is permitted only by SMR, Private Carrier Paging, and LMS licensees. See Subparts F, P, and S of this part.

7. Section 90.203 is amended by adding new paragraph (b)(7) to read as follows:

§ 90.203 Type acceptance required.

* * * * *

(b) * * *

(7) Transmitters used in LMS systems in the 902-928 MHz band authorized prior to [effective date of rules].

* * * * *

8. Section 90.205(b) is amended by adding the 902-928 MHz band to the table and by adding footnote (13) to read as follows:

§ 90.205 Power.

* * * * *

(b) * * *

Frequency range (megahertz)	Maximum Output power (watts)	Maximum effective radiated power (watts)
* * * * *		
902-928	.....	300 ([13])
* * * * *		

13 Effective radiated power shall be measured as peak power.

* * * * *

9. Section 90.209 is amended by adding new paragraphs (b)(10) and (m) to read as follows:

§ 90.209 Bandwidth limitations.

* * * * *

(b) * * *

(10) The maximum authorized bandwidth shall be 8 MHz and the minimum authorized bandwidth shall be 2 MHz for LMS operations in the bands 904-912 and 918-926 MHz. The maximum authorized bandwidth shall be 2 MHz for LMS operations in the bands 902-904 and 926-928 MHz. The maximum authorized bandwidth for LMS systems operating in the band 912-918 shall be 6 MHz.

* * * * *

(m) For transmitters authorized under Subpart F that operate in the 902-928 MHz band the peak power of any emission shall be attenuated below the power of the highest emission contained within the authorized channel bandwidth in accordance with the following schedule:

(1) On any frequency within the authorized bandwidth: Zero dB.

(2) On any frequency outside of the authorized bandwidth: $55 + 10\log(P)$ dB where (P) is the highest emission (watts) of the transmitter inside the authorized bandwidth.

(3) The resolution bandwidth of the instrumentation used to measure the emission power shall be 100 kHz. If a video filter is used, its bandwidth shall not be less than the resolution bandwidth.

(4) Emission power (P) shall be measured in peak values.

10. Section 90.213 is amended by adding the 902-904, 904-912, 912-918, 918-926, and 926-928 MHz bands to the table in paragraph (a) to read as follows:

§ 90.213 **Frequency tolerance.**

(a) * * *

Frequency Tolerance

Frequency range	Fixed and base stations		Mobile stations	
	Over 200W output power	200 w or less output power	Over 2W output power	2W or less output power
		* * * * *		
902-904	(14)	(14)	(14)	(14)
904-912	.0005	.0005	.0005	.0005
912-918	(14)	(14)	(14)	(14)
918-926	.0005	.0005	.0005	.0005
926-928	(14)	(14)	(14)	(14)
		* * * * *		

11. Section 90.239 is removed and reserved.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-170

In re Applications of

TRACY A. MOORE d/b/a GIFFORD ORION BROADCASTING, LTD. — File No. BPH-880308MK

JOHN E. MORRIS and LAWRENCE BAKER d/b/a MORBAK COMMUNICATIONS — File No. BPH-880309ME

AMERIWAVE, INC. — File No. BPH-880309MF

JIANT BROADCASTING COMPANY, INC. — File No. BPH-880310ME

MOLLY BEARD BROADCASTING, INC. — File No. BPH-880310MS

For Construction Permit for a
New FM Station on Channel 234A
in Gifford, Florida

ORDER

Adopted: March 31, 1993; Released: April 12, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. The Review Board has under consideration a Joint Request for Approval of Settlement Agreements filed February 8, 1993 by the above-captioned applicants; a Petition for Leave to Amend filed February 8, 1993 by Ameriwave, Inc.; an Opposition filed February 18, 1993 by the Mass Media Bureau; Supplements to the joint request and petition for leave to amend filed March 2, 1993; a Reply filed March 2, 1993 by Molly Beard Broadcasting, Inc.; a Joint Reply and supplemental clarification filed March 2, and March 17, 1993, respectively, by the other applicants; and Comments filed March 19, 1993 by Media 5, Inc.

2. In an *Initial Decision*, 7 FCC Rcd 3391 (ALJ 1992), Administrative Law Judge John M. Frysiak (ALJ) granted the application of Beard for a new FM station at Gifford, Florida. The parties filed exceptions and replies, but urged the Board to defer action until the instant filings, advising that they had reached an agreement in principle to settle the case.

3. The settlement agreements contemplate the grant of Ameriwave's application, as amended, and the dismissal of the mutually exclusive pending applications in return for monetary payments not to exceed their legitimate and prudent expenses. Molly Beard would also receive $60,000 under a two-year consulting agreement. To fund the settlement, Ameriwave would bring in a new forty-nine percent stockholder, James Pagano, whose company Media 5 would receive an option to acquire the remaining fifty-one percent of the stock as early as permitted under the Commission's rules. Upon Media's election to exercise its option, Ameriwave would have the right to exercise a reciprocal option. Ameriwave further proposes changes in its technical facilities and a withdrawal of its integration proposal.

4. The Bureau opposes the settlement and amendment on three grounds. First, it contends that the options are a "subterfuge" to permit Pagano and Media to acquire the facilities after only a token delay, and thus do indirectly what the Commission directly barred in *Rebecca Radio of Marco*, 5 FCC Rcd 937, *recon. denied*, 5 FCC Rcd 2913 (1990). There, on its own motion, the Commission vacated a settlement wherein the proposed permittee was not an original party to the proceeding. It concluded that such settlements disserve the public interest by creating an economic incentive for the filing of sham applications in future cases. *See* 5 FCC Rcd at 937 ¶ 3. Here, under the respective options, Media can purchase the balance of Ameriwave's shares for essentially the same price paid by Pagano (*i.e.* $46,550), whereas for Ameriwave to reacquire Pagano's stock it would have to pay 150 percent of all funds advanced by Media, purchase its equipment from Media for another 150 percent of the original price of the equipment, and obtain Media's management services for five years at $4000 per month. The Bureau's other reasons for opposing the settlement are: (1) that the consulting agreement with Beard is an "artifice" permitting Beard to exceed her legitimate and prudent expenses, prohibited by *Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85 (1990), *modified*, 6 FCC Rcd 2901 (1991); and (2) that Ameriwave's proposed withdrawal of its integration proposal contravenes the Commission's policy enunciated in *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 160 (1990), *clarified*, 6 FCC Rcd 3403 (1991).

5. In reply to the Bureau, the parties assert that the settlement agreements are patterned on models previously held to be acceptable by the Commission. Thus, with respect to the Bureau's criticism of Ameriwave's reciprocal option, they contend that in *Lamar Communications, Inc.*, 6 FCC Rcd 7022 (1991), the Commission approved a global settlement containing a reciprocal option similar to the one here given to Ameriwave. Appended to their joint reply is a copy of the reciprocal option language of the agreement in *Lamar* obtained from Commission files and submitted for comparison purposes. In her separate reply, Beard also submits a copy of a consulting agreement and the Bureau's comments in support filed in the Colonial Heights, Tennessee, FM proceeding in conjunction with a settlement agreement approved by a Commission ALJ. *See Murray Communications*, FCC 92M-91, released January 23, 1992 (ALJ) (MM Docket No. 91-189). The Colonial Heights consulting agreement appears to differ from the instant agreement only in that it was for a one year period and involved $15,000.

6. Because the Bureau did not have a procedural opportunity to respond to the parties' arguments that virtually identical settlements have been approved by the Commission, those arguments have not been fully joined.

It would therefore assist the Board in its deliberations to have the Bureau's views about the relevancy of *Lamar* to the instant option provisions. Similarly, although the parties have not referenced any instances where the full Commission itself has approved a buy-out settlement which includes a separate and valuable *consulting* agreement, it appears that at least one ALJ has approved such an agreement with the Bureau's support. *See, e.g., Murray Communications*. An explanation would be helpful here as well.

7. ACCORDINGLY, IT IS ORDERED, That the Chief, Mass Media Bureau IS DIRECTED TO FILE a supplemental brief in accordance with paragraph 6 of this Order within ten (10) days of the Order's release date; and that the parties MAY FILE responsive pleadings five (5) days thereafter.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Complainants,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-382
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-383
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-384
WISCONSIN BELL, INC.,	File No. E-89-385
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-386
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-387
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-388
PACIFIC BELL TELEPHONE COMPANY, and	File No. E-89-389
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-390
Defendants.	

ERRATA

Released: April 9, 1993

1. The *Memorandum Opinion and Order* (*MO&O*) in the above-captioned proceedings (FCC 93-74), released February 23, 1993, is corrected by deleting the entire section titled SOUTHWESTERN BELL and inserting in its place:

SOUTHWESTERN BELL

[all amounts in dollars($)]

CompTel File No. E-89-390	DAMAGES (1)	OFFSETS (2)	NET
Aerofone	1,594	990	604
Dscnt. Comm.	1,159	3,635	0
Telecom. Svcs.	311	502	0

FOOTNOTES RELATING TO SOUTHWESTERN BELL

[1] We accept CompTel's calculations of damages.

[2] SWB provided unchallenged calculations of offsets for underearnings in its Answer to Complainants' First Set of Interrogatories filed July 9, 1992.

2. In addition, the *MO&O* is corrected by deleting, in the section titled PACIFIC BELL, the amount listed as damages with regard to Execuline of Sacramento ($28,479) and replacing that amount with $8,479.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDAMERICAN LONG DISTANCE COMPANY,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-406
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, and	File No. E-89-407
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-408

Defendants.

ERRATUM

Released: April 9, 1993

1. The *Memorandum Opinion and Order* in the above-captioned proceedings (FCC 93-58), released February 22, 1993, is corrected by deleting paragraph 49 and inserting in its place:

> 49. IT IS FURTHER ORDERED that Pacific Bell Telephone Company, Mountain States Telephone and Telegraph Company, and Northwestern Bell Telephone Company SHALL PAY to MidAmerican Long Distance Company interest on the damages awarded here computed at the relevant IRS rates set forth in Appendix A beginning January 1, 1987 until the date full payment is made.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COM SYSTEMS, INC.,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY, and THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

File No. E-89-420
File No. E-89-421

ERRATUM

Released: April 9, 1993

1. The *Memorandum Opinion and Order* in the above-captioned proceedings (FCC 93-60), released February 23, 1993, is corrected by deleting paragraph 49 and inserting in its place:

> 49. IT IS FURTHER ORDERED that Pacific Bell Telephone Company and Mountain States Telephone and Telegraph Company SHALL PAY Com Systems, Inc. interest on the amount of damages awarded here at the IRS rates set forth in Appendix A from January 1, 1987 until the date full payment is made.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-428
WISCONSIN BELL, INC.,	File No. E-89-429
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-429
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-430
MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY,	File No. E-89-432
NORTHWESTERN BELL TELEPHONE COMPANY, and	File No. E-89-433
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-434

Defendants.

ERRATA

Released: April 9, 1993

1. The *Memorandum Opinion and Order* in the above-captioned proceedings (FCC 93-61), released March 1, 1993, is corrected by the insertion in the caption of the following File Nos.:

PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-430
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-431

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN SHARECOM, INC.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY,	File No. E-91-131
PACIFIC BELL TELEPHONE COMPANY, and	File No. E-91-132
WISCONSIN BELL, INC.	File No. E-91-134

Defendants.

ERRATA

Released: April 9, 1993

1. The *Memorandum Opinion and Order* (*MO&O*) in the above-captioned proceedings (FCC 93-63), released February 24, 1993, is corrected by deleting the last 3 sentences of paragraph 51 and inserting in their place:

> 51. ... In addition, we find that interest should begin to accrue from January 1, 1989, the day after which the 1987-1988 monitoring period ended. At that point, defendants were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[107] from defendants to American Sharecom from January 1, 1989 until the date of full payment to American Sharecom.

2. In addition, the *MO&O* is corrected by deleting paragraph 54 and inserting in its place:

> 54. IT IS FURTHER ORDERED that the above-named Michigan Bell Telephone Company, Pacific Bell Telephone Company and Wisconsin Bell, Inc. SHALL PAY to American Sharecom, Inc. interest on the damages awarded here computed at the IRS rates set forth in Appendix A from January 1, 1989 until the date full payment is made.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

FOOTNOTE

[107] The applicable IRS rates are set forth in Appendix A.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO.
GTE HAWAIIAN TELEPHONE CO., INC.
MCI INTERNATIONAL, INC.
WORLD COMMUNICATIONS, INC.

File No. I-T-D-93-004

Application for authority to discontinue operation of the HAW-3 cable system and to modify the cable landing license.

ORDER AND AUTHORIZATION

Adopted: March 31, 1993; Released: April 12, 1993

By the Chief, International Facilities Division:

1. The above-captioned uncontested application, filed on December 10, 1992 by American Telephone & Telegraph Co., GTE Hawaiian Telephone Co., Inc., MCI International, Inc. and World Communications, Inc. (Applicants), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to permanently discontinue operation of the HAW-3 cable system (Cable) and to modify the cable landing license accordingly. The application was placed on public notice on December 23, 1992. No comments were received.

2. The HAW-3 cable extends from San Luis Obispo, California to Makaha, Oahu, Hawaii,[1] and has a capacity of 845 voice-grade circuits between. The cable was placed in service on September 1, 1974. The applicants state that the cable has been experiencing a degradation in service due to unexpected corrosion at the repeater connections. Therefore, the co-owners have agreed that repair is not economically feasible. All IRU holders have been notified of the owners' proposal to retire the cable and none has expressed any objection. In fact, all of the IRU holders have notified the co-owners that arrangements have been made to transfer traffic currently routed on HAW-3 to other facilities.

3. Upon review of the application, we find that the cable has reached the end of its useful service life and all circuits can be transferred to other facilities. Thus, there will be no impairment of service to any community or part of a community formerly served by the cable as a result of its retirement.

4. Accordingly, IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance of use and operation by the applicants of the HAW-3 cable and the substitution of other facilities.

5. Within 60 days after the release of this order, the applicants shall notify the Commission of the accounting treatment they intend to use in retiring the HAW-3 cable.

6. Upon discontinuance of use and operation of the HAW-3 cable, the applicants shall notify the Commission thereof and submit to the Commission for cancellation of the submarine cable landing license.

7. This order issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] Cable Landing License and Section 214 Authorization were issued on June 15, 1973. *See* 41 FCC 2d 454 and 43 FCC 2d 505 (1973).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TRT International, Inc. File No. I-T-C-90-144

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to Acquire and Operate Landline Facilities Between New York, New York and the United States and Canada Border and to Utilize Such Facilities to Provide Its Authorized Services Including Switched Voice Services Between the United States and Canada

ORDER AND CERTIFICATION

Adopted: March 31, 1993; Released: April 12, 1993

By the Chief, International Facilities Division:

1. The above-captioned application, filed by TRT International, Inc. (TRTI), pursuant to Section 214 of the Communications Act of 1934, as amended, seeks authority to acquire and operate facilities for the provision of its authorized services including switched voice services between the United States and Canada. We placed the application on public notice, and we received no comments.[1]

2. In its application, TRTI requests authority to lease one T-1 channel, to be multiplexed to provide 24 voice-grade circuits, between its operating offices in New York and Buffalo, New York and interconnection facilities at the Buffalo, New York/Peace Bridge, Ontario border crossing from RCI Long Distance, Inc.[2] Unitel Communications (Unitel) will provide the connecting facilities in Canada.[3] In addition, TRTI seeks authority to use the leased facilities to provide switched voice services between the United States and Canada through interconnection with Unitel's facilities in Canada and local resellers in Canada utilizing Unitel's underlying facilities.[4]

3. Accordingly, IT IS ORDERED that application File I-T-C-90-144 IS GRANTED and TRTI, subject to the following conditions, is authorized to:

a. lease and operate one T-1 channel between its operating office in New York, New York and Buffalo, New York;

b. lease and operate the appropriate connecting facilities at the Buffalo, New York and Peace Bridge, Ontario border crossing; and

c. use said leased facilities to resell international private lines for the provision of switched services between the United States and Canada only.[5]

4. IT IS FURTHER ORDERED that:

a. a copy of contracts for the lease of facilities entered into with other carriers or a contract summary shall be publicly filed by TRTI in accordance with Section 203 of the Communications Act, 47 U.S.C. §203, and the *Interexchange Order*;[6] and

b. the services TRTI obtains from authorized common carriers shall be made generally available to similarly situated customers at the same terms, conditions and rates.

5. IT IS FURTHER ORDERED that neither TRTI nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which TRTI or any such persons or companies controlling or controlled by TRTI are parties.

6. IT IS FURTHER ORDERED that TRTI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that TRTI shall file semi-annual circuit reports to Canada pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. §63.10(b).

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[1] TRT is an authorized nondominant international common carrier.

[2] RCI is an international common carrier authorized to resell international private lines for the provision of switched and private line services.

[3] TRTI has already filed separately, pursuant to Section 43.51, a copy of its operating agreement with Unitel Communications (Unitel).

[4] We note that should TRTI obtain any interest in facilities beyond Canada for the purpose of providing common carrier services between the United States and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies* 102 FCC 2d 812 (1985), *recon. denied* 60 R/.R. 2d 1435 (1986), it would be necessary for TRTI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[5] In *fONOROLA Corporation and EMI Communications Corporation* (fONOROLA), 7 FCC Rcd 7312 (1992), *petition for recon. pending*, the Commission determined that Canada affords resale opportunities equivalent to those available under U.S. law. Therefore, resale of international private lines for switched services and of interconnected international private lines for private line services between the United States and Canada is permitted subject to appropriate authorization.

[6] *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5902 (1991) (*Interexchange Order*). *See also*, Cable and Wireless Communications, Inc., 7 FCC Rcd 6653 (1992).

8. IT IS FURTHER ORDERED that TRTI shall file a copy of any operating agreements, including the applicable accounting rate and any other terms of agreement, entered into with foreign correspondents in Canada with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

9. IT IS FURTHER ORDERED that TRTI shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this Order.

10. IT IS FURTHER ORDERED that TRTI shall file all arrangements for private line interconnection to the U.S. public switched network, pursuant to Section 43.51(a) of the Commission's Rules, 47 C.F.R. §43.51(a).

11. IT IS FURTHER ORDERED that grant of this authorization is conditioned upon Canada's continuing to afford resale opportunities equivalent to those available under U.S. law.

12. IT IS FURTHER ORDERED that the authority granted herein to resell international private lines between the United States and Canada is limited to the provision of the authorized services between the United States and Canada only -- that is, private lines which carry traffic that originates in the United States and terminates in Canada or traffic that originates in Canada and terminates in the United States.

13. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the Regulation of International Accounting Rates, Phase II, Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), and any related proceedings.

14. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services TRTI seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

15. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Litel Telecommunications Corp. — File No. I-T-C-90-028

Application for Authority to Operate as an International Private Line Carrier to Canada, Japan, Australia, Germany, Singapore, France, Switzerland, Hong Kong, Brazil, Italy, Spain, Mexico, Ireland, Belgium, the Netherlands, and the United Kingdom

ORDER AND CERTIFICATION

Adopted: March 31, 1993; Released: April 12, 1993

By the Chief, International Facilities Division:

1. The above-captioned application filed by Litel Communications Corp. (LCI)[1] requests authority to resell international private lines for the provision of switched services between the United States and Canada and to resell international private lines for the provision of private line services between the United States and Canada, Japan, Australia, Germany, Singapore, France, Switzerland, Hong Kong, Brazil, Italy, Spain, Mexico, Ireland, Belgium, the Netherlands and the United Kingdom.

2. We placed the original application on public notice and received no comments. On May 29, 1992, LCI amended its application to request authority to resell international private lines for the provision of switched services to Canada.[2] AT&T then filed a Petition to Deny. In response, LCI filed an Opposition to which AT&T replied.

3. AT&T's Petition addresses only the issue of whether Canada affords resale opportunities equivalent to those available under U.S. law. Subsequent to the filing of this petition, the Commission addressed the issue of Canadian equivalency in the *fONOROLA Corporation and EMI Communications Corporation (fONOROLA/EMI Order)*.[3] In that order, the Commission found that Canada affords equivalent resale opportunities thus rendering AT&T's Petition moot. As a result, resale of international private lines for switched services and of interconnected international private lines for private line services between the United States and Canada is permitted subject to appropriate authorization.[4] However, AT&T has filed a petition for reconsideration of the Commission's Canadian equivalency finding in the *fONOROLA/EMI Order*.[5] We therefore grant this authorization subject to possible modification or revocation based on the outcome of that pending petition for reconsideration.

4. Accordingly, IT IS ORDERED that application File I-T-C-90-028 IS GRANTED and LCI is authorized to resell international private lines not interconnected to the public switched network for the provision of international private line services between the United States and each of the fifteen (15) international points, as specified in Appendix A, and to resell international private lines for the provision of switched and private line services between the United States and Canada.[6]

5. IT IS FURTHER ORDERED that LCI is authorized to lease and operate one-half interest in up to 210 DS-1 circuits for the provision of private line services to the various international points specified in Appendix A,[7] and 200 DS-1 circuits for the provision of switched and pri-

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[1] Litel Telecommunications Corp. is now doing business as LCI International (LCI). *See* Amendment to Application, dated May 29, 1992. LCI is both a domestic and nondominant international service provider (*see* W-P-C-5389 and I-T-C-86-154).

[2] LCI had previously amended its Application on April 20, June 6, July 18, August 21, 1990 and February 4, 1991.

[3] *See fONOROLA/EMI Order*, 7 FCC Rcd 7312 (1992), *petition for recon. pending.*

[4] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not result in the unilateral diversion of U.S. inbound switched traffic to private lines, and thus, exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates*, CC Docket 90-337, Phase II, First Report and Order, 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of intentional private lines for private line services. Nonetheless, the Commission confirmed the right of an end user to interconnect ins international private line to the PSN through, for example, its own PBX. (*See Regulation of International Accounting Rates*, CC Docket 90-337, Phase II, Order on Reconsideration and Third Further Notice of Proposed Rulemaking (*Phase II Third Further Notice)*, 7 FCC Rcd 7927 (1992)).

[5] *See* n.3, *supra.*

[6] *See fONOROLA/EMI Order* at n.3 , *supra.*

[7] *See* Appendix A for list of authorized international points and circuits, derived from March 31, 1993 Supplement to Application. We note that should LCI obtain any interest in facilities beyond the authorized sixteen international points for the purpose of providing common carrier services, including private line service, between the United States and other international points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for LCI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

vate line services to Canada, as specified in Appendix A, pursuant to the tariffs of authorized U.S. common carriers.[8]

6. IT IS FURTHER ORDERED that neither LCI nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which LCI or any such persons or companies controlling or controlled by LCI are parties.

7. IT IS FURTHER ORDERED that LCI shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the authority granted herein to resell international private lines between the United States and Canada is limited to the provision of the authorized services between the United States and Canada only -- that is, private lines which carry traffic that originates in the United States and terminates in Canada or traffic that originates in Canada and terminates in the United States.

9. IT IS FURTHER ORDERED that LCI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

10. IT IS FURTHER ORDERED that LCI shall file semi-annual reports of circuit additions, pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. §63.10(b).

11. IT IS FURTHER ORDERED that LCI shall file a copy of any operating agreements entered into with foreign correspondents with the Commission within 30 days of their execution.

12. IT IS FURTHER ORDERED that LCI shall file all arrangements for private line interconnection to the U.S. public switched network, pursuant to Section 43.51(a) of our Rules, 47 C.F.R. §43.51(a).

13. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice, fONOROLA/EMI Order*, and any related proceedings.

14. IT IS FURTHER ORDERED that grant of the authorization to resell international private lines for the provision of switched services and interconnected private lines for the provision of private line services to Canada is conditioned upon Canada's continuing to afford resale opportunities equivalent to those afforded under U.S. law.

15. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services LCI seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

16. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Country	DS-1 Circuit Requirements
Non-interconnected Private Line for Private Line Service	
Japan	20
Australia	10
Germany	15
Singapore	15
France	20
Switzerland	15
Hong Kong	15
Brazil	10
Italy	10
Spain	10
Mexico	15
Ireland	10
Belgium	10
Netherlands	15
United Kingdom	20
Interconnected Private Lines for Switched and Private Line Services	
Canada	100 Private Line
Canada	100 Switched

[8] LCI intends to resell the services of, *inter alia*, AT&T, MCI, and U.S. Sprint. *See* Application and amendments.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-428
WISCONSIN BELL, INC.,	File No. E-89-429
INDIANA BELL TELEPHONE COMPANY, INC.	File No. E-90-167
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-168

and

OHIO BELL TELEPHONE COMPANY,	File No. E-90-169

Defendants.

ORDER

Adopted: April 2, 1993; Released: April 12, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989 and May 11, 1990, Telesphere Network, Inc. (Telesphere) filed the above-captioned formal complaints against defendants seeking damages resulting from defendants' alleged violations of the Commission's rate of return prescriptions for the periods October 1, 1985 through December 31, 1986 and January 1, 1987 through December 31, 1988. On March 29, 1993, however, Telesphere and defendants filed a joint motion to dismiss the complaints with prejudice stating that the parties have agreed to a settlement which disposes of all issues and controversies in the above-captioned complaints without further reconsideration or appeal.[1]

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[2]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Telesphere's and defendants' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the Applications for Review filed on March 7, 1991 by Telesphere ARE DISMISSED.

5. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
and Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] On March 1 and 4, 1993, the Commission released orders resolving the above-captioned complaints. Memorandum Opinion and Order, FCC 93-61 (released March 1, 1993) and Memorandum Opinion and Order, FCC 93-67 (released March 4, 1993) (collectively "*MO&Os*"). Telesphere and defendants, however, have settled all issues between them raised in the complaints, and, accordingly, have no obligations under the *MO&Os*.

[2] Telesphere filed applications for review of actions holding these above-captioned complaints in abeyance. *See, e.g., Order*, 6 FCC Rcd 653 (Com. Car. Bur. 1991). Because the underlying disputes have been resolved by agreement between the parties, the applications for review are moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, File No. E-89-434
Defendant, File No. E-90-170

and

In the Matter of

NATIONAL TELEPHONE SERVICES, INC.,
Complainant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, File No. E-91-057
Defendant.

ORDER

Adopted: April 2, 1993; Released: April 12, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989 and May 11, 1990, Telesphere Network, Inc. (Telesphere) and on January 6, 1991, National Telephone Services, Inc. (NTS) filed the above-captioned formal complaints against Southwestern Bell Telephone Company (SWBT) seeking damages resulting from SWBT's alleged violations of the Commission's rate of return prescriptions for the periods October 1, 1985 through December 31, 1986 and January 1, 1987 through December 31, 1988. On March 16, 1993, however, Telesphere, NTS, and SWBT filed a joint motion to dismiss the complaints with prejudice stating that the parties have agreed to a settlement which disposes of all issues and controversies in the above-captioned complaints without further reconsideration or appeal.[1]

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[2]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Telesphere's, NTS', and SWBT's Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the Applications for Review filed on March 7, 1991 by Telesphere and NTS ARE DISMISSED.

5. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
and Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] On March 1, 3, and 4, 1993, the Commission released orders resolving the above-captioned complaints. Memorandum Opinion and Order, FCC 93-61 (released March 1, 1993), Memorandum Opinion and Order, FCC 93-76 (released March 3, 1993) and Memorandum Opinion and Order, FCC 93-67 (released March 4, 1993) (collectively "*MO&Os*"). Telesphere, NTS, and SWBT, however, have settled all issues between them raised in the complaints, and, accordingly, have no obligations under the *MO&Os*.

[2] Telesphere and NTS filed applications for review of actions holding these above-captioned complaints in abeyance. *See, e.g., Order*, 6 FCC Rcd 653 (Com. Car. Bur. 1991). Because the underlying disputes have been resolved by agreement between the parties, the applications for review are moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.
COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
DIAL 'N SAVE, INC. (T/A DIAL AMERICA),
LONG DISTANCE SERVICE, INC.,
METROMEDIA LONG DISTANCE, INC.,
NATIONAL TELESERVICES, INC.,
RCI NETWORK SERVICES, INC.,
TELAMARKETING CORP. OF LOUISIANA,
TOTAL-TEL USA,
VALU-LINE OF THE LEHIGH VALLEY, INC.
(T/A CHADWICK VALU-LINE), and
WESTEL, INC.,
Complainants.

v.

THE BELL ATLANTIC TELEPHONE COMPANIES,
Defendants.

File No. E-91-135

ORDER

Adopted: April 2, 1993; Released: April 12, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1991, Valu-Line of the Lehigh Valley (T/A Chadwick Valu-Line) (Valu-Line) and Dial 'N Save (T/A Dial America), along with other complainants, filed the above-captioned formal complaint against The Bell Atlantic Telephone Companies (Bell Atlantic) seeking damages resulting from Bell Atlantic's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On March 1, 1993, however, Valu-Line, Dial 'N Save, and Bell Atlantic filed a joint motion for partial dismissal stating that the parties have agreed to a settlement that disposes of all issues and controversies in the above-captioned complaint.

2. We are satisfied that partial dismissal of the complaint with respect to claims by Valu-Line and Dial 'N Save will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Valu-Line's, Dial 'N Save's, and Bell Atlantic's Joint Partial Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED to the extent it relates to the claims of Valu-Line and Dial 'N Save.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] On March 15 1993, the Commission released an order resolving the above-captioned complaint. Memorandum Opinion and Order, FCC 93-75 (released March 15, 1993) (*MO&O*). Valu-Line, Dial 'N Save, and Bell Atlantic, however, have settled all issues between them raised in the complaint, and, accordingly, have no obligations under the *MO&O*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.,
COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
LONG DISTANCE SERVICE, INC.,
METROMEDIA LONG DISTANCE, INC.,
NATIONAL TELESERVICES, INC.,
RCI NETWORK SERVICES, INC.,
SCHNEIDER COMMUNICATIONS, INC.,
TELAMARKETING CORP. OF LOUISIANA,
TOTEL-TEL USA, and
WESTEL, INC.,
Complainants,

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, and	File No. E-91-146
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-91-147
Defendants.	

ORDER

Adopted: April 2, 1993; Released: April 12, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1991, Westel, Inc. (Westel), along with other complainants, filed the above-captioned formal complaints against Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company (BellSouth) seeking damages resulting from BellSouth's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On March 11, 1993, however, Westel filed a motion for partial dismissal of its complaints. Westel states that a settlement has been reached between the parties.

2. We are satisfied that partial dismissal of the complaints with respect to claims by Westel will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Westel's Motion for Partial Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED to the extent they relate to the claims of Westel.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] On March 15 1993, the Commission released an order resolving the above-captioned complaints. Memorandum Opinion and Order, FCC 93-75 (released March 15, 1993) (*MO&O*). Westel and the defendants, however, have settled all issues between them raised in the complaints, and, accordingly, have no obligations under the *MO&O*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BUSINESS CHOICE NETWORK,
Complainant,

v. File No. E-92-095

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: April 5, 1993; Released: April 12, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On June 26, 1992, Business Choice Network (BCN) filed the above-referenced formal complaint against American Telephone and Telegraph Company (AT&T). On August 6, 1992, AT&T filed its answer. On April 2, 1993, BCN requested dismissal, without prejudice, of its complaint.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above-captioned complaint IS DISMISSED WITHOUT PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints
and Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BUSINESS CHOICE NETWORK,
Complainant,

v. File No. E-92-089

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: April 5, 1993; Released: April 12, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On June 15, 1992, Business Choice Network (BCN) filed the above-referenced formal complaint against American Telephone and Telegraph Company (AT&T). On July 24, 1992, AT&T filed its answer. On April 2, 1993, BCN requested dismissal, without prejudice, of its complaint.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above-captioned complaint IS DISMISSED WITHOUT PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints
and Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Waiver of Section
97.313(b) of the Commission's Rules
Governing Transmitter Power
Standards in the Amateur Service.

ORDER

Adopted: April 5, 1993; Released: April 12, 1993

By the Chief, Private Radio Bureau:

1. On December 16, 1992, Dale E. Gagnon, filed a request for waiver of Section 97.313(b) of the Commission's Rules, 47 C.F.R. § 97.313(b). He requests the waiver so that he can use a transmitter at his amateur station for amplitude modulated (AM) emissions in excess of the 1,500 watts peak envelope power maximum permitted in the rule.

2. The instant request for waiver is a further effort of Mr. Gagnon to obtain a greater output power for his station than the output power allowed amateur stations transmitting any of the other 1,300 types of emissions authorized in the amateur service. His previous request to amend Section 97.313(b) was denied, as was his petition for reconsideration of that denial.[1] Mr. Gagnon has not shown that his circumstances are unique nor has he presented any facts that would warrant a waiver of the transmitter power standard prescribed by Section 97.313(b). The issue of specifying a transmitter power standard for one emission type that is different from the power standard for other emission types, moreover, is an issue that has previously been decided by the Commission.[2] Mr. Gagnon's waiver request, therefore, is also repetitive.

3. In view of the foregoing, and pursuant to Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, the request of Mr. Dale Gagnon for waiver of Section 97.313(b) to allow higher power for his amateur station IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

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[1] *See* 5 FCC Rcd 6374 (1990) and 6 FCC Rcd 4433 (1991).

[2] *See Report and Order* in PR Docket No. 82-624, adopted July 18, 1983, 54 RR2d 723 (1983). *See also Memorandum Opinion and Order* in the same proceeding, adopted September 5, 1984, 56 RR2d 1521 (1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

LAWTON CHILES, BOB MARTINEZ,
and BILL NELSON

Against Station WTVT(TV),
Tampa, Florida

MEMORANDUM OPINION AND ORDER

Adopted: April 6, 1993; Released: April 12, 1993

By the Chief, Mass Media Bureau

1. The Mass Media Bureau has before it a "Petition for Reconsideration of *Further Discovery Order*" ("Petition") filed on January 26, 1993, by WTVT License, Inc. ("WTVT"). On February 3, 1993, Lawton Chiles, Bob Martinez, and Bill Nelson ("Complainants") filed their Opposition to WTVT's Petition, and on February 9, 1993, WTVT filed its Reply to Complainants' Opposition. On February 3, 1993, Complainants filed a "Motion to Compel and Motion for Sanctions Against WTVT License, Inc." ("Motion"). Also on February 3, 1993, WTVT filed its Opposition to Complainants' Motion.

WTVT's Petition for Reconsideration

2. In its Petition, WTVT contends that paragraphs 14 and 15 of the *Further Discovery Order*, DA 93-57, released January 21, 1993, cast unwarranted aspersions upon its discovery performance and it requests that the paragraphs be stricken. WTVT argues that it has acted responsibly and in full compliance with the Commission's previous discovery mandates and submits documents which it claims support this premise. WTVT believes that the Bureau's *Further Discovery Order* was inappropriately based upon Complainants' "mischaracterization" of facts. Nevertheless, WTVT does not seek reconsideration of the substantive rulings made by the Bureau except to the extent that it claims that it has already provided some of the information specified in the *Further Discovery Order*.

3. In its Opposition, Complainants contend that the *Further Discovery Order* accurately characterized WTVT's responses to discovery requests as "vague, incomplete, or untimely." Complainants also offer documentation to support their contention that WTVT has not been fully responsive in complying with discovery requests. In its Reply, WTVT provides a Declaration from its Marketing/Research Manager stating that copies of all ratecard/availabilities have been provided to Complainants. Moreover, WTVT argues that Complainants are no better organized and error-free than WTVT.

DISCUSSION

4. The *Further Discovery Order* is an interlocutory action taken by the Bureau with respect to discovery requests in the instant proceeding. Petitions for reconsideration of such interlocutory actions will not be entertained. See Sections 1.102(b)(2) and 1.106(a)(1) of the Commission's Rules. Accordingly, WTVT's Petition will be dismissed. This action is consistent with the Commission's determination that discovery in lowest unit charge ("LUC") cases should be completed in an expeditious manner. See *Declaratory Ruling*, 6 FCC Rcd 7511, 7513 n.49 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992). To allow reconsideration of discovery rulings in LUC cases would seriously undermine the Bureau's and the parties' abilities to complete such proceedings in a timely manner. Moreover, any allegations of decisionally significant errors in discovery rulings may be raised when, and if, review of a final action in this proceeding is sought. *Cf., WWOR-TV, Inc.*, 4 FCC Rcd 6155, 6156 (1989).

Complainants' Motion to Compel and Motion for Sanctions

5. Complainants' Motion, which was prepared on February 2, but not filed at the Commission until February 3, 1993, states that WTVT did not provide the answers to interrogatories and documents at the offices of Complainants' legal counsel on February 1, 1993, as required by the *Further Discovery Order*. Complainants seek a forfeiture penalty against WTVT for its delay in providing its discovery responses.

6. WTVT, in its Opposition, states that a cover letter along with answers to interrogatories were to be faxed to Complainants' counsel's office prior to the close of business on February 1, 1993. In addition, the original copy of the answers to interrogatories was sent by overnight delivery to Complainants' counsel and arrived there on February 2, 1993.

DISCUSSION

7. While we do not condone any delays in response to discovery requests, and expect all parties to comply with established filing dates, we do not believe the one day delay in Complainants' receipt of WTVT's further answers to interrogatories is sufficiently egregious to warrant a forfeiture sanction. However, we caution the parties that repeated abuses of discovery procedures may lead to appropriate sanctions. Moreover, we urge the parties to resolve disputes concerning discovery on an informal basis, if possible.

8. In light of the foregoing, WTVT's Petition for Reconsideration of *Further Discovery Order* is hereby DISMISSED, and Complainants' Motion to Compel and Motion for Sanctions is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Revision of ARMIS USOA Report (FCC Report 43-02) for Tier 1 Telephone Companies and Annual Report Form M	AAD 92-46

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 1993; Released: March 29, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In an Order Inviting Comments (OIC),[1] we proposed to eliminate thirteen schedules from the Annual Report Form M (Form M), to revise six Form M schedules and to complete the automation of Form M by incorporating eighteen Form M schedules into the Commission's Automated Reporting Management Information System (ARMIS). Based on our analysis of the pleadings received in this proceeding, we adopt the proposals in our OIC with some modifications, as discussed in the succeeding paragraphs. In order to allow adequate time to implement this Order, we extend the due dates for the March 31, 1993, Form M filing and the April 1, 1993, ARMIS filing to June 30, 1993.

2. ARMIS is an automated system consisting of ten reports[2] which contain financial and statistical data required by the Commission to administer its accounting, joint cost, jurisdictional separations, rate base, and access charge rules. Local exchange carriers (LECs) with annual revenues in excess of $100 million must file ARMIS reports. The Form M contains corporate, financial and statistical data. It is filed annually in paper form by communications common carriers having operating revenues in excess of $100 million.[3] Carriers currently filing Form M include the larger LECs, AT&T Communications, Alascom Inc., and Communications Satellite Corporation.

3. When the Commission established ARMIS in 1987, it incorporated the two most important Form M schedules, the balance sheet and income statement, into that system.[4] At the same time, the Commission directed the Common Carrier Bureau to review the remainder of the Form M to determine what additional schedules should be included. In 1992 we incorporated twelve more Form M schedules into ARMIS.[5] In the OIC, we proposed to incorporate eighteen additional Form M schedules into ARMIS and eliminate the remaining thirteen schedules, thereby completing the Form M automation task.

II. SUMMARY OF PROPOSALS

4. The thirteen Form M schedules proposed for elimination were Schedules A-4, Voting Powers and Elections; B-4, Uncollectible Accounts; B-5a, Analysis of Telecommunications Plant in Service Retired; B-6a, Analysis of Entries in Property Held for Future Telecommunications Use; B-6b, Analysis of Telecommunications Plant Adjustment; I-2, Special Expenses Attributable to Formal Regulatory Cases; I-5c, Federal Excise Taxes Collected from Users of Respondent's Services; I-6, Advertising; I-7, Membership Fees and Dues; I-10, Analysis of Dividend and Interest Income; I-11, Analysis of Extraordinary Items; S-5, Interstate Private Line; and S-6, Overseas Telephone and Related Services.

5. The eighteen Form M schedules we proposed for incorporation into ARMIS are Schedules A-1, Identity of Respondent; A-2, Control Over Respondent; A-3, Board of Directors and General Officers; A-5, Stockholders; A-6, Important Changes During the Year; B-5b, Analysis of Entries in Accumulated Depreciation; B-5c, Bases of Charges for Depreciation; B-7, Capital Leases; B-8, Deferred Charges; B-9, Accounts Payable; B-10, Long-Term Debt; B-13, Other Deferred Credits; B-14, Capital Stock; B-15, Capital Stock and Funded Debt Reacquired and Retired During the Year; I-5a, Other Operating Taxes; I-5b, Prepaid Taxes and Tax Accruals; I-8, Special Charges; and I-9, Donations or Payments for Services Rendered by Persons Other Than Employees. We proposed to retain these schedules because we determined that we still need to routinely collect data in these schedules in order to monitor the carriers' operations for regulatory purposes.

6. We proposed to revise six Form M schedules. We proposed to revise Schedule A-1, Identity of Respondent, by requiring carriers to report their states of incorporation and the states in which they operate. We proposed to revise Schedule B-5b, Analysis of Entries in Accumulated

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[1] Revision of ARMIS USOA Report (FCC Report 43-02) for Tier 1 Telephone Companies and Annual Report Form M, *Order Inviting Comments*, 6 FCC Rcd 6669 (1992).

[2] The ten ARMIS Reports are: the Quarterly Report (43-01); the USOA Report (43-02); the Joint Cost Report (43-03); the Access Report (43-04); the Forecast Report (495-A); the Actual Usage Report (495-B); the Quarterly Service Quality Report (43-05); the Semi-Annual Service Quality Report (43-06); the Infrastructure Report (43-07); and the Operating Data Report (43-08).

[3] Section 219 of the Communications Act of 1934, as amended, 47 U.S.C. §219, authorizes the Commission to require annual reports to be filed by carriers subject to its jurisdiction. The annual reporting requirement is set forth in Section 43.21 of the Commission's Rules, 47 C.F.R. §43.21. Section 1.785 of the Rules, 47 C.F.R. §1.785, specifies that telephone companies shall file the required annual report on Form M. The actual contents of Form M are established from time to time by the Common Carrier Bureau pursuant to delegated authority.

[4] *See* Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules), *Report and Order*, CC Docket No. 86-182, 2 FCC Rcd 5770 (1987) (*ARMIS Order*), *modified on recon.*, 3 FCC Rcd 6375 (1988).

[5] *See* Revision of ARMIS USOA Report (FCC Report 43-02) for Tier 1 Telephone Companies, *Memorandum Opinion and Order*, 7 FCC Rcd 1083 (1992).

Depreciation, by requiring additional detail regarding retirements of telephone plant. We proposed to revise Schedule B-9, Accounts Payable, by requiring carriers to report the accounts payable data for affiliates only. We proposed to add to Schedule B-14, Capital Stock, a column to indicate whether the class of stock in question has voting rights. Further, we proposed to revise Schedule I-8, Special Charges, by requiring additional detail regarding lobbying expenses. We also proposed to revise Schedule I-9, Donations or Payments for Services Rendered by Persons Other Than Employees, by requiring the carriers to report recipients to whom $10,000 or more was paid for membership fees and dues.

7. We proposed a new schedule entitled "Summary of Investment and Accumulated Depreciation By Jurisdiction" for the collection of aggregate data on plant investment and accumulated depreciation for each jurisdiction.

8. Appended to the OIC were a series of tables and accompanying instructions that detailed how we would implement our proposals. We sought comment on these proposed tables and instructions. We proposed that all of the newly-automated Form M schedules become part of the ARMIS USOA Report, and that the tables and schedules in that report be renumbered. Finally, we proposed that after the changes became effective, the USOA Report and the Operating Data Report would be the new Form M. Under this approach, carriers who are required to file both ARMIS and Form M reports would satisfy the Form M reporting requirements by filing both diskette and paper copies of the ARMIS reports. Carriers who must file Form M reports but are not required to file ARMIS reports would, nevertheless, file paper copies of the Form M schedules in the same format as the ARMIS reports.

III. DISCUSSION

A. Automation of Eighteen Form M Schedules

9. The majority of the commenting parties[6] support the proposal to automate data collection and incorporate the remaining Form M schedules into the ARMIS USOA Report. These parties agree that the Commission's efforts to automate data collection will provide an effective and efficient way to collect and analyze data, thereby conserving time and resources for both the Commission and the carriers.[7] Because of the benefits we believe will result from the automation of Form M schedules, we adopt our proposal and incorporate into ARMIS all the Form M schedules that we decide are needed.

10. In the OIC, we proposed to incorporate eighteen Form M schedules into ARMIS. Some of the commenting parties argue that this proposal did not go far enough in eliminating costly and duplicative reporting requirements. USTA, for example, lists nine schedules within this group which it identifies as having duplicative data elements.[8] Certain parties recommend that some schedules be eliminated and, alternatively, that reporting requirements be reduced should the Commission decide to retain all eighteen schedules.[9] Several of these parties believe that the amount of modified and new information in the ARMIS tables, together with the revision of reports' format, require a change in the timetable for filing the new ARMIS tables with the Commission. These recommendations and other concerns raised by commenting parties are addressed in the succeeding paragraphs.

B. Corporate Information Schedules - C-1, Identity of Respondent, C-2, Control Over Respondent, C-3, Board of Directors and General Officers, C-4, Stockholders, and C-5, Important Changes During the Year

11. These schedules provide information on corporate identity, control and ownership. In the OIC we proposed to automate four of the corporate information schedules and to revise the Identity of Respondent schedule to require the carriers to report their states of incorporation and the states in which they operate. USTA recommends that these schedules be eliminated and requests the Commission to use the Securities and Exchange Commission's (SEC's) Form 10-K as the form for carriers to report the requested information.[10] USTA also recommends that these schedules be filed only if changes in the information on the schedules have occurred during the reporting period. United questions the need to mechanize these schedules because the information included in these schedules is non-numerical data and does not lend itself to automation.[11]

12. We will not adopt USTA's suggestion that we eliminate these schedules. These schedules are useful for ascertaining the identity of persons who control the telephone companies. A review of the SEC Form 10-K requirements shows that the details we require are not included in that filing. In response to United's claim that the requirements are not suited for computerized data files, we have modified the format of these schedules, and they are now in a format suitable for computer storage.

C. Depreciation Schedules - B-5, Analysis of Accumulated Depreciation, B-6, Summary of Investment and Accumulated Depreciation by Jurisdiction, and B-7, Bases of Charges for Depreciation

13. Schedule B-5 provides an analysis of the activities in Account 32.3100, Accumulated depreciation, by depreciable plant account. Schedule B-7 provides an analysis of the charges for depreciation for each class or subclass of depreciable plant for which a depreciation rate is determined. In the OIC we proposed to automate these schedules and to include a new schedule, Schedule B-6, to provide a summary of aggregate investment and aggregate accumulated depreciation activities during the year by jurisdiction. We also proposed to include a requirement

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[6] Comments were received from eight parties and reply comments from four parties. Appendix A lists these parties as well as the abbreviations this Order uses to identify them.

[7] USTA Comments at 2; the Pacific Companies Comments at 1; United Comments at 1; SWBT Comments at 1; GTE Comments at 1; BellSouth Comments at 1; Bell Atlantic Comments at 1.

[8] USTA Comments at Attachment 1.

[9] USTA Comments at Attachment 1; the Pacific Companies Comments at 1; United Comments at 1; SWBT Comments at 1; GTE Comments at 1; BellSouth Comments at 1; Bell Atlantic Comments at 1.

[10] USTA Comments at Attachment 1.

[11] United Comments at 2.

that retirements of plant with and without traffic be reported separately in Schedules B-5 and B-6. USTA, the Pacific Companies, and United suggest that we eliminate the requirement in Schedule B-5 to report separately retirements of plant with traffic and retirements of plant without traffic.[12] They argue that only total retirements of plant should be required. The parties also suggest that, because retirements of plant with traffic are rare, such data, if needed, could be disclosed in footnotes to the schedules.

14. We reject these suggestions. The proposed segregation of retirement data in Schedule B-5 is necessary to the Commission's depreciation prescription process. Plant retired with traffic and plant retired without traffic are accounted for differently.[13] This accounting difference is critical to an accurate determination of the accumulated depreciation balance, and an accurate accumulated depreciation balance is necessary to determine depreciation rates under the Commission's remaining-life depreciation rate formula.[14] Moreover, relegating this data to footnotes minimizes the costs savings goal of ARMIS because analysis of information in footnotes requires greater staff intervention, such as staff manually entering footnote data into the ARMIS database. Therefore, we will adopt Schedules B-5 and B-6 as proposed.

15. The Pacific Companies and GTE suggest that if we establish new ARMIS Schedule B-6, Summary of Investment and Accumulated Depreciation By Jurisdiction, we should eliminate the Annual Change in Telephone Plant Report (ACTPR) found in FCC's Depreciation Study Guide.[15] We agree. Beginning in 1994, the study guide requirement for ACTPR will be eliminated. For 1993, however, carriers required to file the ACTPR must do so by April 1, 1993, as required by the Study Guide because this information will be needed by that date for the ongoing review of depreciation rates.

16. GTE suggests that Schedule B-7, Bases of Charges for Depreciation, should be eliminated because it restates information published in the Commission's depreciation prescription orders. We agree with GTE that these orders are the best sources for information in Schedule B-7. As a result, we are not going to require carriers whose depreciation rates are prescribed by the Commission to file this schedule. Carriers filing ARMIS reports who do not have their depreciation rates prescribed by the Commission, however, must file schedule B-7 with their annual ARMIS filings. Therefore, we adopt Schedule B-7 as proposed.

D. Capital Leases Schedule - Schedule B-8, Capital Leases

17. This schedule provides information on capital lease activity in the accounts during the year. In the OIC we proposed to automate this schedule. USTA states that Schedule B-8, Capital Leases, should be eliminated and recommends that the Commission rely on the Notes to the Financial Statements of SEC Form 10-K for information on capital leases.

18. We do not agree with USTA's proposal to eliminate Schedule B-8. We find that not all carriers file a SEC Form 10-K, and that those carriers who do follow no set format for reporting capital lease information. Further, we find that carriers who do file SEC Form 10-K reports do not report sufficient information on capital leases to support our review requirements. Therefore, we will retain Schedule B-8 as proposed.

E. Net Deferred Income Taxes and Prepaid Taxes and Tax Accruals Schedules - B-12, Net Deferred Income Taxes, and I-5, Prepaid Taxes and Tax Accruals

19. These schedules provide information on the activity in the prepaid taxes, income taxes accrued, and other taxes accrued accounts during the year. In the OIC we proposed to automate these schedules. USTA suggests that the Commission should eliminate Schedules B-12, Net Deferred Income Taxes, and I-5, Prepaid Taxes and Tax Accruals, because the level of detail required for these schedules is far in excess of that required for other Part 32 accounts.[16] As an alternative, USTA recommends that Schedule I-5 be revised to require information only for the current and prior years. SWBT suggests a simpler, more summarized version that it claims would be sufficient for our requirements.[17]

20. We will adopt neither USTA's suggestion to eliminate Schedules B-12 and I-5 nor SWBT's suggestion of a summarized version of Schedule I-5. The argument that these schedules require more detailed data than Part 32 requires and, thus, should be eliminated or simplified is unpersuasive. Schedule B-12 provides us with the breakdown of the tax liability between property related and nonproperty related, current and noncurrent, and the Federal and state and local portions. We need this breakout in order to monitor the carrier's tax expenses for the period under report. The parties' primary complaint is with providing the components of changes to the accounts during the year. We believe that this is not burdensome since the data must be maintained for taxing authorities, such as the Internal Revenue Service.

21. We also do not adopt USTA's alternative suggestion that Schedule I-5 be modified to require information for only the current and immediately preceding years. This schedule provides information that is useful to the Commission's auditors in their review of carriers' tax information from prior years. Therefore, we will adopt Schedules B-12 and I-5 as proposed. While we are adopting these schedules as proposed, we will be revisiting the tax area again in implementing the requirements of the Financial Accounting Standards Board's Statement of Financial Accounting Standards No. 109, Accounting for Income Taxes, in our Uniform System of Accounts for telephone companies. At that time we will undertake a comprehensive review of all ARMIS tax schedules.

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[12] United Comments at 3; Pacific Comments at 7; USTA Comments at Attachment 1.

[13] *See* 47 C.F.R. 32.2000 (d)(2)(i) (plant retired without traffic) and 47 C.F.R. 32.2000 (d)(5) (plant retired with traffic).

[14] 47 C.F.R. 32.2000 (g)(2)(ii).

[15] Pacific Comments at 4; GTE Comments at 3. This guide was created by the Bureau to provide guidance to carriers regarding depreciation rate filings. It was established in 1982 and is updated annually.

[16] USTA Comments at Attachment 1.

[17] SWBT Comments at 3.

F. Special Charges Schedule - Schedule I-6, Special Charges

22. This schedule provides information on expenses the carriers incurred during the year for special charges such as lobbying expenses and charitable contributions. In the OIC we proposed to automate this schedule and require additional detail regarding lobbying expenses in Schedule I-6. As explained in the OIC, we proposed that five specific types of lobbying expenses be identified: grassroots advertising expenses; legislative lobbying expenses; other grassroots expenses; political contributions, gifts, and honoraria; and affiliates' lobbying expenses. USTA, Bell Atlantic, and SWBT oppose the OIC proposal to require additional detail for lobbying expenses. They argue that this proposal requires more information than that required in the Commission's accounting rules and is unnecessary because lobbying expenses are not included in their regulated revenue requirements.[18] SWBT also argues that the lobbying classifications are ambiguous.[19] USTA recommends that the Commission either eliminate this schedule or delay reporting of this information until the 1993 reporting year to allow companies sufficient time to adapt their accounting systems to the new tracking method. Bell Atlantic suggests that the Commission should adopt the proposal on a prospective basis only starting with the year 1993.[20]

23. We do not agree that we should eliminate Schedule I-6. We are interested in knowing the amount that carriers spend on special charges, Account 7370, including lobbying expenses, and how carriers account for these expenses to ensure their proper regulatory treatment. However, because we agree with SWBT that the lobbying expense classifications proposed in the OIC need further refinement, we will only require that total lobbying expenses be reported at this time. Therefore, we adopt Schedule I-6 with amendments.

G. Donations or Payments for Services Rendered by Persons Other Than Employees Schedule - Schedule I-7, Donations or Payments for Services Rendered by Persons Other Than Employees

24. This schedule provides information on payments to academia and payments for services rendered by persons other than employees. In the OIC we proposed to automate this schedule while retaining the current reporting thresholds.[21] We also proposed to add a requirement that the carriers report recipients to whom $10,000 or more was paid for membership fees and dues. USTA, the Pacific Companies and SWBT suggest that the Commission should eliminate Schedule I-7 because of the manual effort and cost of preparing it.[22] As an alternative, USTA recommends that the requirement for vendor reporting be deleted, and that aggregated amounts be reported by categories with a reporting threshold of $1 million. The Pacific Companies suggest that the threshold be raised to $25,000 for academia and to $100,000 for consulting, research, and financial services. SWBT also requests that the thresholds be increased but does not propose new levels. USTA and the Pacific Companies request that the threshold for membership fees and dues be raised to $25,000.

25. We will not eliminate Schedule I-7. We established the proposed thresholds in order to obtain adequate levels of detail regarding the carriers' transactions with outside service providers. Deleting vendor reporting and permitting the reporting of only aggregated amounts as suggested by various parties would eliminate much of this detail. Even though the Pacific Companies state that the thresholds they recommend would still encompass most outside service provider transactions which they now report, we find that their recommended thresholds would not yield similar results for many other carriers. Therefore, we will retain the current thresholds.

26. We will not raise the threshold for membership fees and dues above the $10,000 level proposed in the OIC. In the Form M membership fees and dues schedule the number of organizations and amounts paid to them were required to be reported. To be consistent with the requirements of Schedule I-7, however, we proposed to make the membership fees and dues requirement subject to a $10,000 reporting threshold. While we are not certain that the $10,000 reporting threshold will yield all necessary detail, we believe it is an adequate threshold. After the initial reporting has been made, we will take another look at the threshold to see if a change in future reporting is appropriate. For now, we will adopt Schedule I-7 as proposed.

H. Extension of Filing Dates

27. In the OIC we stated that we intended to incorporate the new ARMIS tables into the USOA Report in time for the carriers' 1992 Form M and ARMIS submissions, scheduled to be filed on March 31, 1993 and April 1, 1993, respectively. USTA, the Pacific Companies, United, GTE and BellSouth request an extension of these filing dates because of the large number of schedules being mechanized and revised, the addition of a new plant schedule, and the revision of the reports' format.[23] These parties request that the 1992 Form M and ARMIS USOA Report be due 120 days after the issuance of a final Order including the data specifications and page lay-outs, and that edit checks be available at least one month prior to the reporting date.

28. Sections 43.21(a) and 43.21(f) of the Commission's rules require that the Form M reports for 1992 be filed no later than March 31, 1993, and that the USOA Report for 1992 be filed no later than April 1, 1993.[24] We will extend these due dates to June 30, 1993, to provide the

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[18] USTA Comments at Attachment 1; Bell Atlantic Comments at 1; SWBT Comments at 1.

[19] SWBT Comments at 2.

[20] Bell Atlantic Comments at 2.

[21] For advertising and information services, clerical and office services, computer and data processing services, personnel services, printing and design services, and security services the current reporting threshold is $250,000. For auditing and accounting services, consulting and research services, financial services, legal services and any other type of service the current reporting threshold is $25,000. There is no threshold for payments to academia.

[22] USTA Comments at Attachment 1; the Pacific Companies Comments at 5; SWBT Comments at 2.

[23] USTA Comments at 3 and 4; the Pacific Companies Comments at 2; United Comments at 1; GTE Comments at 4; and BellSouth Comments at 2.

[24] 47 C.F.R. §43.21(a), (f).

carriers with sufficient time to implement this Order.[25] We find that data on the ARMIS USOA Report and the Form M need to be submitted within a reasonable time so that appropriate analyses and reports can be prepared. Even though the carriers argue that 120 days are necessary to provide them with time to prepare the reports, past conversions to ARMIS[26] have shown that 90 days have been adequate time for the carriers to make their filing when the report specifications are included in the Order. We find that a June 30 deadline provides sufficient time for the carriers to prepare and file their reports.

I. Special Access Collocation Data

29. ALTS requests that the Commission modify the ARMIS reports to collect information on the number and size of collocation spaces, total collocation revenues, and the number and type of cross-connections.[27] ALTS states that this information is essential to evaluate the LECs' estimates of reconfiguration activity that, pursuant to the Commission's Local Transport Order,[28] form an important element for interconnection charges. ALTS claims that collocation data as of December 31, 1992, would provide a baseline against which to measure actual traffic growth and actual reconfiguration expenses. USTA, NYNEX and GTE disagree, arguing that ALTS's recommendation is outside the scope of this proceeding, goes beyond Part 32 requirements, has no logical place within the ARMIS USOA Report and would require exchange carriers to provide proprietary information.[29] In its reply comments,[30] however, NYNEX admits that the Commission must begin to collect data from LECs, interexchange carriers, interconnectors and large end users so that the Commission can evaluate its actions in the Expanded Interconnection proceeding[31] and the Transport Rate Structure and Pricing proceeding.[32]

30. We will not adopt ALTS's suggestion that we modify in this proceeding the ARMIS reports to collect information on collocation and cross-connections. In the OIC, we did not propose revisions to the ARMIS reports to collect this information. We believe the information the Commission needs to monitor expanded interconnection and transport rate structures and pricing is more appropriately addressed in the two above-mentioned proceedings.

J. Other Issues

31. **Technical and Clerical Changes** - We are adopting a number of technical and clerical changes to correct and clarify certain aspects of the USOA Report tables. Many of these changes were proposed by commenting parties, others we are implementing as a result of our own analysis of the schedules.

32. The following appendices are attached to this Order: (1) Appendix A is a list of commenting parties in this proceeding; (2) Appendix B is a list of all Form M Schedules; and (3) Appendix C is a comprehensive description of revised FCC Report 43-02, instructions and reporting procedures.

IV. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, 215, 218, 219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-205, 215, 218-220, that the ARMIS USOA Report (FCC Report 43-02) IS REVISED, and Annual Report Form M IS AMENDED, as set forth in the attached Appendix C, effective June 30, 1993.

34. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-205, 215, 218, 219, 220 of the Communications Act of 1934, as amended, 47 C.F.R. §§154(i), 154(j), 201-205, 215, 218-220, that Section 43.21(a) and (f) of the Commission's Rules, 47 C.F.R. §43.21(a), (f), ARE HEREBY WAIVED to the extent stated in paragraph 28 of the Order.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

APPENDIX A

Parties Filing Comments in AAD 92-46

Association For Local Telecommunications Services (ALTS)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Corporation (BellSouth)

GTE Service Corporation (GTE)

Pacific Bell and Nevada Bell (the Pacific Companies)

Southwestern Bell Telephone Company (SWBT)

United States Telephone Association (USTA)

United Telephone System Companies (United)

Parties Filing Reply Comments in AAD 92-46.

Bell Atlantic

GTE

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[25] Appendix includes the data specifications and page lay-outs.

[26] *See* Revision of ARMIS USOA Report (FCC Report 43-02) for Tier 1 Telephone Companies, *Memorandum Opinion and Order*, 7 FCC Rcd 1083 (1992).

[27] ALTS Comments at 1 and 2.

[28] *See Transport Rate Structure and Pricing*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-213, 7 FCC Rcd 7006 (1992) (*Local Transport Order*).

[29] USTA Reply Comments at 1 and 2; NYNEX Reply Comments at 1; GTE Reply Comments at 1 and 2.

[30] NYNEX Reply Comments at 3.

[31] *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, CC Docket Nos. 91-141 and 92-222, 7 FCC Rcd 7369, 7491-92, para. 262 (1992).

[32] *See Local Transport Order*, 7 FCC Rcd at 7039-40, paras. 63-64.

NYNEX Telephone Companies (NYNEX)
USTA

APPENDIX B

LIST OF ARMIS TABLES AND FORM M SCHEDULES

ARMIS Report	Table/Form M Schedule	Title
		CORPORATE INFORMATION SCHEDULES
43-02	C-1	Identity of Respondent
43-02	C-2	Control Over Respondent
43-02	C-3	Board of Directors and General Officers
43-02	C-4	Stockholders
43-02	C-5	Important Changes During the Year
		BALANCE SHEET SCHEDULES
43-02	B-1	Balance Sheet Accounts
43-02	B-2	Statement of Cash Flows
43-02	B-3	Investments in Affiliated Companies
43-02	B-4	Analysis of Assets Purchased from or Sold to Affiliates
43-02	B-5	Analysis of Entries in Accumulated Depreciation
43-02	B-6	Summary of Investment and Accumulated Depreciation by Jurisdiction
43-02	B-7	Bases of Charges for Depreciation
43-02	B-8	Capital Leases
43-02	B-9	Deferred Charges
43-02	B-10	Accounts Payable to Affiliates
43-02	B-11	Long-Term Debt
43-02	B-12	Net Deferred Income Taxes
43-02	B-13	Other Deferred Credits
43-02	B-14	Capital Stock
43-02	B-15	Capital Stock and Funded Debt Reacquired or Retired During the Year
		INCOME STATEMENT SCHEDULES
43-02	I-1	Income Statement Accounts
43-02	I-2	Analysis of Services Purchased from or Sold to Affiliates
43-02	I-3	Pension Cost
43-02	I-4	Other Operating Taxes
43-02	I-5	Prepaid Taxes and Tax Accruals
43-02	I-6	Special Charges
43-02	I-7	Donations or Payments for Services Rendered by Persons Other Than Employees
		STATISTICAL SCHEDULES
43-08	S-1	Outside Plant Statistics
43-08	S-2	Switched Access Lines in Service by Technology
43-08	S-3	Access Lines in Service by Customer
43-08	S-4	Telephone Calls

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 31, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PUERTO RICO TELEPHONE COMPANY CPNI NOTIFICATION
CC Docket NO. 86-309

On February 24, 1993, the Puerto Rico Telephone Company (PRTC) filed the Customer Proprietary Network Information (CPNI) notification required in the *Puerto Rico Reconsideration Order*. *See* 8 FCC Rcd 69 (1993). In the *Puerto Rico Reconsideration Order*, the Commission stated that PRTC may satisfy the Commission's CPNI requirements in either of two ways. As set forth in the *Puerto Rico Order*, PRTC can comply with the CPNI requirements that apply to the Bell Operating Companies. *See* 2 FCC Rcd 6600 (1987). Alternatively, the Commission stated that PRTC can treat Telefonica Larga Distancia de Puerto Rico (TLD), an affiliate, in exactly the same manner that it treats other off-island interexchange carriers (IXCs), *i.e.*, withholding all individual CPNI unless disclosure is authorized by the customer. Under this latter approach, CPNI must be released to all off-island carriers including TLD on the same terms and conditions.

In the CPNI notification, PRTC states that it will provide CPNI to all off-island IXCs, including TLD, on the same terms and conditions. PRTC states that it will withhold all individual CPNI from such carriers unless a customer authorizes release. PRTC also states that it has implemented this policy.

Interested parties should file comments on the petition by **April 29, 1993,** and reply comments by **May 14, 1993,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc., 2100 M St., N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from International Transcription Services at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 31, 1993

TRANSPORT RATE STRUCTURE AND PRICING

CC Docket No. 91-213

COMMENTS REQUESTED ON THE MANNER IN WHICH LECS WITH NO SPECIAL ACCESS OFFERINGS AT CERTAIN CAPACITIES SHOULD ESTABLISH RATES FOR DIRECT-TRUNKED TRANSPORT AND ENTRANCE FACILITIES AT SUCH CAPACITIES

On October 16, 1992, the Commission released a Report and Order and Further Notice of Proposed Rulemaking in *Transport Rate Structure and Pricing*, CC Docket No. 91-213, 7 FCC Rcd 7006 (1992) (*Order*). We have received petitions for reconsideration or clarification of the *Order*, and comments and reply comments thereon, from a number of parties. We seek additional comment on one narrow issue.

In their petition, the United Telephone Companies noted that they had no generally tariffed DS3 special access rates on September 1, 1992. United Telephone Companies Petition for Reconsideration and Clarification, CC Docket No. 91-213, at 5 n.4 (filed Dec. 21, 1992). Other local exchange carriers (LECs) do not offer special access at certain capacities (*i.e.*, voice grade, DS1, or DS3), but anticipate that there will be demand for direct-trunked transport and entrance facilities at such capacities, and have informally sought guidance on how they should establish rates for such transport services. The *Order* does not specify how LECs should establish switched transport rates for capacities at which they do not offer special access, and this issue was not directly raised in petitions for reconsideration.

In general, the Commission found in the *Order* that because LECs provide switched transport using facilities similar to those used for special access, special access rates provide a rational surrogate for using a cost showing to develop direct-trunked transport and entrance facility rates. *Order*, 7 FCC Rcd at 7028, ¶ 42. This surrogate is not available, however, to LECs that do not offer special access service at capacities for which they expect switched transport demand.

Therefore, we seek comment on alternative surrogates. For example, a LEC might be able to develop a reasonable surrogate based on a comparison of its rates for other special access services with a neighboring LEC's rates for such services. Specifically, such a LEC could compare its rates for special access service at a capacity that it *does* offer with the rates of the contiguous Bell Operating Company (BOC) or other contiguous LEC for the same service. The LEC's rates for direct-trunked transport and entrance facilities at the capacity it does not offer (*e.g.*, DS3) could be set to diverge from the BOC's or other LEC's rates for special access services at that capacity by the same percentage that its rates for special access services it offers (*e.g.*, voice grade) diverge from the neighboring LEC's rates for such services. We seek comment on this approach.

We also seek comment on whether alternative surrogates could be developed that are objectively verifiable and simple to implement. Parties favoring use of the new service test applicable under price cap or rate of return regulation should explain why use of such a test is desirable. In this context, we request that parties not comment on the general issue of whether July 1993 or September 1992 special access rates should be the basis of switched transport rates, because this issue has been thoroughly discussed in the petitions for reconsideration and the comments and reply comments thereon.

Comments should be filed by **April 14, 1993,** and reply comments should be filed by **April 26, 1993.** All comments and reply comments should be filed with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Parties also should send copies of their comments and reply comments to David L. Sieradzki, Policy and Program Planning Division, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554 and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 130, Washington, D.C. 20036.

This remains a non-restricted rulemaking proceeding for purposes of the Commission's *ex parte* rules. *Ex parte* presentations are permitted, except during any Sunshine Agenda period, provided they are disclosed as described in the Commission's rules. *See* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206. For further information, contact David L. Sieradzki, (202) 632-1304, or Douglas L. Slotten, (202) 653-6975, Policy and Program Planning Division, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Emmis FM Broadcasting Corporation of Boston — File No. BRH - 901203WH

For Renewal of License for
Station WCDJ(FM)[1]
Boston, Massachusetts

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: March 31, 1993; Released: March 31, 1993

By the Commission:

1. The Commission has before it for consideration: (i) a license renewal application filed for the captioned station; (ii) a Petition to Deny timely filed on March 1, 1991, by the New England State Conference of Branches of the NAACP, the Connecticut State Conference of Branches of the NAACP and by various local NAACP branches (collectively "NAACP") against the renewal of this broadcast station:[2] (iii) an opposition from the licensee; (iv) the licensee's response to a staff letter of inquiry; and (v) a Joint Request for Approval of the Settlement Agreement filed by the NAACP and Emmis FM Broadcasting Corporation of Boston.

2. *SETTLEMENT AGREEMENT.* On July 17, 1991, the NAACP filed a motion to withdraw the challenge against the renewal for station WCDJ(FM) and, together with the licensee, Emmis FM Broadcasting Corporation of Massachusetts, filed a settlement agreement. We have reviewed the settlement agreement pursuant to 47 C.F.R. Section 73.3588 and *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780 (1989), *recon. granted in part*, 5 FCC Rcd 3902 (1990)(*Renewal Policies Order).* We find that the settlement agreement generally complies with the Commission's rules and policies, and therefore, the petition is dismissed. However, notwithstanding the agreement, we have reviewed the station's Equal Employment Opportunity (EEO) Program and performance pursuant to Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. Section 309. We find the licensee did not engage in affirmative recruitment efforts for a substantial number of its vacancies and failed to maintain adequate records for much of its tenure. Thus, we will grant renewal subject to the appropriate remedies and sanctions.

3. *DISCUSSION.* Section 73.2080 of the Commission's Rules, 47 C.F.R. 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and 73.2080(c).

4. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987)(*Broadcast EEO), petition for recon. pending; see also* 4 FCC Rcd 1715 (1989)(request for clarification by the National Association of Broadcasters). *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d. 621 (D.C. Cir. 1978).

5. Review of the licensee's renewal application and inquiry response indicated that from September 1988 to December 1, 1990, the licensee had 38 full-time job vacancies, including 32 upper-level positions, for which it reported the following minority referrals: Boston University (five), unsolicited/referrals from other radio stations (five), the *New England Ad Week* (four), Boston Black Media Coalition (two), and the *Boston Globe* (one). WCDJ(FM) indicates in its inquiry response that it is unable to locate recruitment data for positions filled during the first 15 months of operation. However, it provided recruitment and applicant flow information on 14 hiring opportunities between December 1989 and November 1990 -- the renewal year. For ten of the 14 jobs, the licensee used a list of 12 general, female and minority sources.[3] For a program director position, the licensee

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[1] On September 19, 1988, the Commission granted the application for voluntary transfer of control of the license from National Broadcasting Company, Inc. to Emmis Broadcasting Corporation. We note also the station's call sign change from WJIB to WCDJ(FM) on October 26, 1990.

[2] The Petition to Deny also included challenges against other radio stations in Massachusetts, Connecticut and Rhode Island. Those stations will be addressed in a separate Commission order.

[3] The list of 12 referral sources included: the National Association of Broadcasters Employment Clearinghouse (hereinafter "NAB"), Boston Black Media Coalition, American Women in Radio and Television, Department of Employment and Training, Northeastern University, Boston University, Burdett School, Katherine Gibbs School, the *Boston Globe*, the *Bay State Banner*, the *Middlesex News*, and the *New England Ad Week*.

reported no recruitment. WCDJ(FM) used station-based sources such as internal applicants along with tapes and resumes on file at the station for three announcer vacancies. The licensee reported 102 applicants for the 14 jobs, including 12 Blacks for eight positions.[4] Of the reported 55 interviewees, six Blacks were interviewed for five upper-level jobs. No minorities were hired for the 38 positions during the three-year review period. However, WCDJ(FM) reports that in February 1991, two months prior to the expiration of its license, it hired a Black male for a sales vacancy. He left the station in April 1991.[5]

6. WCDJ(FM) states that despite its lack of records, it recruited with minority sources throughout its tenure and, as proof, submits a notice for a receptionist vacancy which it sent to the NAB in May 1989. The licensee reports that early in 1990 it self-assessed its EEO program to enhance its overall efforts, as well as its record-keeping, and that this action proves it focused early in its tenure on its program deficiencies. According to the station, as a result of the new procedures implemented following its program review, all of its recruitment sources will be contacted for each vacancy and given "more detailed data." Additionally, explains WCDJ(FM), it conducted another assessment in October 1990 after which it added more recruitment sources, "combined with adoption of more structured record-keeping requirements and a renewed commitment to achieve minority hiring results."[6]

7. Based on the foregoing, we find no substantial or material questions of fact to warrant a hearing. We find no evidence in the record of employment discrimination and the licensee recruited, attracted and employed minorities during the license term. Accordingly, grant of the station's renewal application is warranted. However, we find the licensee's efforts to recruit qualified minorities deficient for much of its tenure. WCDJ(FM)'s record does not substantiate a continuing program of EEO efforts for the first 15 months of its license term, during which it filled 24 job vacancies.[7] Moreover, even after its assessment, the licensee failed to recruit for an additional four vacancies, for a total of 28 (74%) unrecruited positions. The licensee reported 12 Black applicants, six Black interviewees and no Black hires for 14 jobs during the review period, but did hire one Black for an upper-level position two months prior to expiration of its license.

8. Upon review of the record, we find that grant of the renewal application is justified. However, for violation of our EEO Rule as reflected above, by this *Order*, we issue a Notice of Apparent Liability for $18,750 and impose reporting conditions.[8]

9. Accordingly, IT IS ORDERED that the Petition to Deny filed by the New England State Conference of Branches of the NAACP, the Connecticut State Conference of Branches of the NAACP and by various local NAACP branches IS DISMISSED.

10. IT IS FURTHER ORDERED that the Joint Request for Approval of the Settlement Agreement IS GRANTED and the settlement agreement submitted by NAACP and Emmis FM Broadcasting Corporation of Boston is approved.

11. IT IS FURTHER ORDERED that the license renewal application for WCDJ(FM) IS GRANTED subject to the reporting conditions specified herein, and pursuant to Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $18,750.

12. IT IS FURTHER ORDERED that the licensee of station WCDJ(FM) submit to the Commission an original and one copy of the following information on December 1, 1994, December 1, 1995, and December 1, 1996:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and FCC job category, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[9]

(b) A list of all employees as of the November 1, 1994, payroll period for the first report and as of the November 1, 1995, and November 1, 1996, payroll periods for the second and third reports by job title and FCC job category, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In

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[4] The 12 Black applicants resulted from a "word of mouth" referral, the *Boston Globe*, Boston University, other radio stations, the *New England Ad Week*, Boston Black Media Coalition and unsolicited applicants.

[5] The Boston, Massachusetts Metropolitan Statistical Area (MSA) includes 45.2% females and 7.9% minorities (4.7% Black, 1.8% Hispanic, 1.3% Asian-Pacific Islander, .1% American Indian). WCDJ(FM)'s Annual Employment Reports from 1989 to 1991 included 24 to 27 full-time employees and 19 to 24 upper-level employees. No minorities were reported in any year during the licensee's tenure.

[6] After the second assessment, the modified recruitment list included 64 referral sources.

[7] The licensee's May 1989 job vacancy notice to the NAB does not constitute adequate evidence of an ongoing and meaningful EEO program from December 1988 to November 1989.

[8] Due to the pending application for voluntary transfer of control of WCDJ(FM) from the licensee to Greater Boston Radio, Inc. (BTCH - 921204GR), we note that upon grant of that application, the reporting conditions imposed herein will follow the license and pass automatically to the assignee. *See Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989).

[9] Such a list might start:

1) News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T
	1 Hispanic male	National Hispanic Media Coalition
	1 Black female	NAACP

Sources contacted - Local newspaper, A.W.R.T., National Hispanic Media Coalition and NAACP

Selected - Hispanic male (08/19/91)

addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

13. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

14. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

15. Should you have any questions regarding this action or require further information concerning employment reports, you may call the Mass Media Bureau's EEO Branch at (202) 632-7069. With respect to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this Order. Any comments concerning the ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-59

In the Matter of

Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum for Wind Profiler Radar Systems — RM-8092

NOTICE OF PROPOSED RULE MAKING AND NOTICE OF INQUIRY

Adopted: March 10, 1993; Released: April 1, 1993

Comment Date: June 15, 1993
Reply Comment Date: July 15, 1993

By the Commission: Commissioner Marshall not participating.

INTRODUCTION

1. By this Notice of Proposed Rule Making (NPRM) and Notice of Inquiry (NOI), the Commission proposes to allocate 449 MHz for wind profiler radar systems (wind profilers) and solicits comment on whether wind profilers also should be accommodated at 915 MHz as proposed by Radian Corporation[1] (Radian), or in some other frequency band. Allocation of this spectrum for wind profilers will facilitate the automated collection of weather information, including data on severe storms that threaten life and property that is not obtainable in any other manner.

BACKGROUND

2. Wind profilers are sensitive Doppler radars that measure wind speed and direction at a variety of altitudes. Establishing a system of wind profilers will facilitate collecting accurate and timely atmospheric data usable in aviation to detect severe wind conditions and to plan flights; in meteorology to improve weather forecasts and warn of severe weather conditions; and in environmental studies to analyze movement of air masses carrying pollutants such as volcanic ash and acid rain. Currently, atmospheric data generally is provided by expendable radiosondes (weather balloons) that are launched periodically. The National Oceanic and Atmospheric Administration (NOAA), the Navy, the U.S. Customs Service, and others (such as universities and private entities) have experimented with wind profilers to explore the possibilities of obtaining real-time information on air movements.

3. *Description of Wind Profiler Radar Systems.*[2] Wind profilers emit pulsed signals vertically in 3 or 5 narrow beams, with mainbeams at zenith and 15-20 degrees off the vertical, separated by 90 degrees in azimuth. Their operation is affected by radio frequency (RF) propagation characteristics. Wind profilers typically can operate in the frequency range of 50-1200 MHz. Those that operate in the vicinity of 50 MHz can provide data up to an altitude of 30 kilometers (km), but lack resolution, particularly at low altitudes. Wind profilers operating in the vicinity of 1000 MHz can provide finer resolution but are impaired by precipitation, and useful altitude coverage is limited to 5-7 km. Frequencies in the range of 200-500 MHz offer a compromise between resolution and altitude coverage that enables wind and direction measurements at altitudes of up to 15-20 km.[3] Because wind profilers detect continuous low-level signals, they must operate in relatively interference-free locations.[4]

4. *NTIA Recommendation.* Experimental wind profilers have been operating on 404.37 MHz but, despite using interference avoidance techniques that include not transmitting whenever satellites are within 30 degrees of the vertical profiler mainbeam, these profilers have interfered with the Cosmicheskaya Sistyema Poiska Avariynych (COSPAS) and Search and Rescue Satellite-Aided Tracking (SARSAT) satellites that have uplinks in the adjacent 406-406.1 MHz band. At the request of the IRAC, the NTIA conducted a study to identify a more suitable frequency for wind profilers, and concluded that 449 MHz is the best available frequency.[5] With the concurrence of IRAC, NTIA recommended to the Commission that Government wind profilers, which consist generally of the 30 existing and 200-300 planned units of the NOAA system, be accommodated at 449 MHz and phased out of the 400.15-406 MHz band by September 30, 1993.[6] Consistent with the NTIA recommendation, the Commission staff notified all non-Government wind profiler experimental licensees that they also will be required to move to 449 MHz by September 30, 1993.

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[1] RM-8092, filed August 13, 1992.

[2] *See* letter from the Associate Administrator, National Telecommunications and Information Administration (NTIA) to the Chief Engineer, FCC dated January 17, 1992, and enclosure 1, *Assessment of Bands for Wind Profiler Accommodation*, NTIA Report 91-290 (1991) (study); enclosure 2, *EMC Analysis Between Type A Wind Profilers and Remote Pickup Broadcast Stations* (analysis); and enclosure 3, Interdepartment Radio Advisory Committee (IRAC) Memorandum.

[3] There are various types of wind profilers, each with different technical characteristics. The two major types identified in the NTIA study are referred to as types A and B. Type A profilers are characterized by a height coverage of 15-20 km, use of minimum-shift keying (MSK) phase modulation and complex coding algorithms to reduce sideband emissions, and require a bandwidth of 2 megahertz. Type B profilers cover an altitude of 5-7 km, do not use MSK or complex coding, and require a bandwidth of 4 megahertz. NTIA's study concluded that Type B profilers cannot be accommodated in the frequency range of 200-500 MHz due to their bandwidth requirement. *Cf.* Radian Reply Comments in RM-8092, requesting a total bandwidth of 12.5 megahertz for wind profilers it proposes to operate at 915 MHz.

[4] Study, p. 3-2.

[5] IRAC Memorandum, *supra* note 2.

[6] See NTIA letter requesting the Commission to initiate this proceeding, *supra* note 2.

5. *Petition.* In a related matter, on August 13, 1992, Radian requested that two megahertz, 914-916 MHz, be allocated on a secondary basis for non-Government wind profilers. Radian states that it has operated experimental wind profilers in this band and that a permanent allocation is needed because wind profilers operating in the 900 MHz band would be capable of finer resolution measurements at low altitudes than 400 MHz wind profilers can provide. After examining the comments on its petition, Radian responded that its request should have been for 12.5 megahertz and requested that 908.75-921.25 MHz be allocated instead of just 914-916 MHz.[7]

DISCUSSION

Notice of Proposed Rule Making

6. *Spectrum Allocation.* In its wind profiler study, NTIA assessed the 216-225, 400.15-406, and 420-450 MHz bands to identify a suitable frequency for permanent accommodation of wind profilers in the United States that also has potential for international use.[8] The NTIA study rejected the 216-225 MHz band for domestic use because it is used extensively by the maritime mobile, land mobile, and amateur services; new radiolocation systems may not be authorized on these frequencies in the United States after January 1, 1990;[9] and the adjacent band is used intensively by broadcasting services. The study also rejected consideration of this band for international use because it is allocated to the broadcasting service on a primary basis in Regions 1 and 3. The 400.15-406 MHz band was rejected because of interference by experimental wind profiler radars to satellite systems that include COSPAS and SARSAT. The 420-450 MHz band is used by a number of major military land-based, shipborne, and airborne systems critical to the national defense. These radiolocation systems perform functions such as early warning of ballistic missile attack on the United States and long range search and track of potential hostile aircraft. The NTIA study concluded that the 440-450 MHz portion of the 420-450 MHz band contains the fewest number of Government assignments, and therefore offers the best potential location for wind profilers.

7. Currently, the 440-450 MHz band examined in the NTIA study is allocated on a primary basis for Government radiolocation operations by the military;[10] Government low-power remote control operations also are permitted;[11] and 449.75-450.25 MHz is allocated on a primary basis for space telecommand operations.[12] In addition, the 440-450 MHz band is allocated on a secondary basis to the Amateur Radio Service (amateur) and to Government and non-Government radiolocation systems for coastal radars.[13]

8. From within the 440-450 MHz segment, the NTIA study identified two candidate center frequencies for wind profilers, 441 and 449 MHz, that it concluded would have the least impact on the Government radiolocation systems that are primary users of this band. The advantage of 441 MHz is that it would be consistent with the Canadian allocation for wind profiler operations. The disadvantage of 441 MHz is that it would have significant impact on military operations, as most of those activities are on frequencies in the lower portion of the 440-450 MHz segment. Conversely, 449 MHz would have minimal impact on military operations, but potentially would impact 448-450 MHz amateur repeater operations. The NTIA study also concluded that to accommodate wind profilers on a primary basis internationally, the frequency band selected from the 440-450 MHz range would require upgrading the existing secondary radiolocation service allocation or adding a new primary meteorological service allocation to the international Table of Frequency Allocations. Based on this study and discussions with IRAC, NTIA selected 449 MHz. In its January 17, 1992 letter, NTIA requested that we allocate this frequency for Government wind profiler radar systems.[14]

9. We agree with NTIA that it is important to provide spectrum for wind profilers. These systems are of great value in providing accurate data to assist in predicting and determining weather conditions. Further, we believe that establishment of a national and possibly an international frequency for their operation could benefit U.S. industry. Therefore, consistent with the conclusions of the NTIA study, we propose to add a new footnote US329 to the domestic Table of Frequency Allocations that will provide for operation of Government wind profiler radar systems at 449 MHz on a primary basis, and to modify footnote G2 consistent with this proposal.[15]

10. We recognize that there are non-Government experimental wind profilers currently operating and that we have advised these licensees to change frequency to 449 MHz. The Department of Defense (DOD), through the IRAC, has expressed concern with respect to the use of the 448-450 MHz band for non-Government wind profilers because of possible interference to military operations. Notwithstanding these concerns, we believe it may be desirable for non-Government wind profiler systems to operate in this band provided that they do not adversely impact the military's operations. For example, researchers may have requirements to continue operation of their

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[7] *See* Radian's pleading, "Reply Comments and Amended Petition for Rule Making," filed on December 17, 1992, as amended by an erratum filed on December 18, 1992. Radian states that upon review, it determined that the bandwidth of its system is 12.5 megahertz, the same bandwidth authorized under its experimental license and used by NOAA for its 900 MHz wind profilers. This comprehensive NOI provides an opportunity for all parties to address the spectrum needs of wind profilers in the 900 MHz range, including the necessary bandwidth.

[8] The International Radio Consultative Committee (CCIR) of the International Telecommunications Union (ITU) established Task Group 8/2 to study suitable frequency bands for operation of wind profiler radars. At the recommendation of the 1992 World Administrative Radio Conference (WARC-92), the CCIR is continuing its studies and preparing recommendations on technically suitable frequency bands, associated standards, and frequency sharing criteria. *See* Recommendation No. 621, *Final Acts of the World Administrative Radio Conference*, Malaga-Torremolinos (1992).

[9] *See* 47 C.F.R. § 2.106, Table of Frequency Allocations (Table), International Footnote 627.

[10] *Id.* at Footnote G2.

[11] *Id.* at Footnote G8.

[12] *Id.* at Footnote US87.

[13] *Id.* at Footnotes US217 and US228.

[14] NTIA letter, *supra* note 2.

[15] We note that wind profiler operations near the U.S.-Canadian border require coordination with Canada. *See* Agreement on Radio Frequencies, June 16 and 24, 1965, United States-Canada, 16 U.S.T. 923, T.I.A.S. No. 5833.

existing 400 MHz wind profilers. We therefore request comment on interest in, and the need for, operation of non-Government wind profiler systems in the 448-450 MHz band.

11. *Protection of Existing Operations.* NTIA proposes to minimize the impact on military operations in the 448-450 MHz band by requiring that wind profiler locations be pre-coordinated with the military services to protect fixed military radars; that wind profiler operations receive no protection from military mobile radiolocation stations; and that wind profiler stations provide protection to military mobile radiolocation stations that are engaged in critical national defense operations.[16] We have included these protections in proposed footnote US329 and request comment on any additional obligations that should be included. (*See* Appendix.) We also solicit comment on whether limits and restrictions on non-Government operation different from those we propose in US329 are needed to avoid interference to military operations that share this band. In addition, we note that the Federal Government is developing technical standards and coordination procedures (for example, required separation distances) to minimize potential interference between Government wind profilers and military radar systems. We request comment on whether non-Government systems should be required to comply with the same technical standards and coordination procedures as Government systems if non-Government wind profilers are authorized at 449 MHz.

12. NTIA's study concluded that a separation of 30-50 km would be needed to preclude co-channel interference by amateur operations to wind profilers.[17] Amateur operations most likely to be affected by the proposed wind profiler allocation are repeaters that operate in the 448-450 MHz segment. NTIA's study further concluded that a separation of 20-40 km would be required to preclude co-channel interference by wind profilers to amateur repeater operations. The study, however, also found that potential interference between amateur and wind profiler operations may be alleviated by using RF screens, such as perimeter fences or berms, at the profiler site and by altering repeater antenna radiation patterns.[18] We request comment on whether these methods could be used to prevent or resolve interference on a case-by-case basis, or whether specific rules governing interference are needed to ensure protection of wind profilers. One approach we intend to consider is whether we should specify a zone around each wind profiler within which amateur operations on 448-450 MHz would be precluded or otherwise limited, and how such a scheme would be administered. In this regard, we note that NOAA indicates that wind profilers operating in the 400 MHz range are planned primarily for rural areas.[19] We therefore expect that few amateur operations would be disrupted by these systems. We are not proposing to change the secondary allocation to the Amateur Radio Service in the 448-450 MHz band, inasmuch as amateur operations in this band already must protect primary operations from harmful interference. Therefore, amateur operations would be required to protect wind profiler operations the same as the other currently protected Government operations.[20] To minimize harmful interference and facilitate coordination, in proposed footnote US329 we require advance notification of at least 120 days by new wind profiler stations to all existing fixed amateur repeaters listed in the latest ARRL Repeater Directory that operate within 50 km of a proposed site. We request comment on this and the other requirements that would be codified by footnote US329 if adopted.

13. NTIA also examined the potential impact of wind profilers centered at 449 MHz on Remote Pickup Broadcast Stations (RPUs) that operate in the adjacent 450-451 MHz band.[21] The NTIA analysis concluded that the distance separation needed to preclude wind profiler interference to RPU ground operations is 5 km for 450 MHz RPUs and 2 km for 451 MHz RPUs. The analysis further concluded that the distance separation needed to preclude wind profiler interference to RPU airborne operations is 15 km for 450 MHz RPUs and 5 km for 451 MHz RPUs. Since NOAA plans to locate wind profiler radars primarily in rural areas, the potential for interference to adjacent channel RPU operations may be low. However, we note that RPUs and their associated operations also are found in rural areas. We invite comment on the potential for adjacent channel interference from 449 MHz wind profiler radar operations to RPUs in the adjacent 450-451 MHz band and to other services, such as the Private Land Mobile Radio Services, that operate above 451 MHz. Parties concluding that there is an unacceptable potential for interference also should address possible methods for resolving such interference.

Notice of Inquiry

14. We seek comment and information on the need for additional spectrum to accommodate other types of wind profiler radar systems. Specifically, we request comment on Radian's proposal to allocate 915 MHz for wind profilers and whether additional spectrum in any other band may be required or desired.

15. The 902-928 MHz band currently is allocated to the radiolocation service on a primary basis for Government use; on a secondary basis to the amateur radio service;[22] and band segments 902-912 MHz and 918-923 MHz are available on a non-interference basis for Automatic Vehicle Monitoring (AVM) systems.[23] In addition, 902-928 MHz is designated for industrial, scientific, and medical (ISM) equipment;[24] and unlicensed devices are permitted on an non-interference basis under Part 15 of the Rules.[25]

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[16] IRAC Memorandum, *supra* note 2.

[17] Study, Table 6-17.

[18] Study, p. 2-6. *See* also "Wind Profilers: Applications and Characteristics," June 1992 *QST* at p. 50.

[19] According to the Director of the Office of Radio Frequency Management, NOAA, profilers "will be built in rural areas where electrical noise is reduced and land is cheaper." *See* "Wind Profiler Frequencies," April 1992 *QST* at p. 24.

[20] We note that the above-referenced NTIA letter states that representatives of the Department of Commerce and the American Radio Relay League (ARRL) are discussing steps to minimize the impact between wind profiler and amateur operations.

[21] Enclosure 2, *supra* note 2.

[22] Table, Footnote US275.

[23] *Id.* at Footnote US218.

[24] Radiocommunication services operating in the 902-928 MHz band must accept harmful interference that may be caused by ISM equipment. *See* Table, International Footnote 707.

[25] *See* 47 C.F.R. § 15.245.

16. In its petition, Radian argues that compared to wind profilers that operate in the 400 MHz range, its experimental 915 MHz system provides finer resolution at low altitudes. This permits detection of wind shear conditions. Radian further states that experimental wind profiler systems have operated in the 902-928 MHz band for more than a decade and, with but one exception, have reported no interference to other users.[26]

17. In comments responding to the Radian petition, the ARRL argues that Radian's request is premature and should be dismissed because the work of CCIR Task Group 8/2 studying wind profilers has just begun; no technical standards have been developed for 900 MHz wind profilers; and Radian has not demonstrated how 900 MHz wind profilers will not cause interference to other users, including amateurs.[27] Similarly, AMTECH Corporation (AMTECH) contends that Radian has not submitted a sufficient technical analysis of potential interference and that the 902-928 MHz band may be needed for expansion of AVM operations.[28] Both EnScan, Inc. (EnScan) and Telxon Corporation (Telxon) oppose Radian's petition, arguing that 915 MHz wind profilers would interfere with devices that operate under Part 15 of the Rules.[29]

18. In response to the opposing comments of EnScan and Telxon, Radian argues that devices operating under Part 15 of the Rules are unprotected and must accept interference from all authorized services, and therefore should be required to accept interference from wind profilers. Radian reiterates that the finer resolution at low altitudes provided by 900 MHz wind profilers is necessary for environmental uses such as monitoring air pollution and ozone levels.

19. We agree with the commenting parties that there is insufficient information in our record regarding the potential impact of an allocation for wind profilers in the 902-928 MHz band on the current uses of this band. We also believe it necessary to explore the implications of a wind profiler allocation on the proposed AVM uses and the necessary bandwidth for the wind profilers that would operate in this band. Accordingly, we solicit comment regarding all aspects of the need for, and implications of, an allocation of spectrum within the 902-928 MHz band for wind profilers. Specifically, we note that Radian initially requested 2 megahertz at 914-916 MHz for its proposed wind profiler operations, but in its reply comments sought to enlarge its request to 12.5 megahertz between 908.75 to 921.25 MHz. Therefore, we seek comment on the bandwidth needed for 900 MHz wind profilers. We also request that commenting parties address the technical characteristics of such wind profilers and their ability to share this spectrum with existing and proposed uses. We further ask parties to comment on the compatibility of wind profilers with the AVM devices proposed and operating in the same spectrum. Finally, we request comment on whether an allocation in the 900 MHz range should include Government as well as non-Government operations and on whether spectrum in addition to the bands at 449 and 915 MHz should be considered for wind profilers.

CONCLUSION

20. In the NPRM section of this proceeding, we propose to allocate the 448-450 MHz band for wind profilers on a co-primary basis. We believe that implementing an allocation at 449 MHz will serve domestic needs and also may establish a frequency that could be used internationally. This action is consistent with Commission goals of promoting efficiency in the allocation and use of the electromagnetic spectrum and promoting the vital interests of the American people in international communications and competitiveness.

21. In the NOI section, we seek comment on Radian's petition for a 915 MHz secondary allocation for wind profilers, request technical information on and bandwidth requirements of wind profilers at this frequency range, and note that Radian's request will be considered with other existing and proposed uses.

PROCEDURAL MATTERS

Regulatory Flexibility Analysis

22. The Commission certifies that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Public Law No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

Ex Parte Rules - Non-Restricted Proceeding

23. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

Notice and Comment

24. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR Sections 1.415 and 1.419, interested parties may file comments on or before June 15, 1993, and reply comments on or before July 15, 1993. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting com-

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[26] Radian attributes the cause of the one case of interference to an incomplete pre-installation site survey. The interference was eliminated by reconfiguring the wind profiler. *See* Radian Reply Comments at p. 7.

[27] *See* ARRL Comments in RM-8092.

[28] *See* AMTECH comments in RM-8092. In PR Docket No. 93-61 the Commission proposed to establish a new Location and Monitoring Service in the entire 902-928 MHz band that would include monitoring and locating objects in addition to vehicles. *See Notice of Proposed Rule Making* in PR Docket No. 93-61, FCC 93-141, adopted March 11, 1993. Any action taken in ET Docket No. 93-59 will take into consideration PR Docket No. 93-61.

[29] EnScan manufactures and distributes automatic utility meter reading equipment, which operate on 910-920 MHz. Telxon manufactures teletransactional data collection and retrieval systems, which typically use spread spectrum transmissions on the 902-928 MHz band.

ments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

Authority

25. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r).

Additional Information

26. For further information contact Carl Huie at (202) 653-8112, Office of Engineering and Technology, Federal Communications Commission, Washington, DC 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

PROPOSED RULE CHANGES

Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sections 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is amended as follows:

a. In columns 4 and 5 of the band 420-450 MHz, footnote US329 is added.

b. The following sections of the Table of Frequency Allocations are amended to read as follows:

Section 2.106 Table of Frequency Allocations

* * * * *

International table			United States table		FCC use designators	
Region 1 - allocation MHz	Region 2 - allocation MHz	Region 3 - allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
			420-450 RADIOLOCATION.	420-450 Amateur.	LAND MOBILE (90)	
					Amateur (97).	
* * *	* * *	* * *				
			664 668	664 668		
			US7 US87 US217	US7 US87 US217		
			US228 US230	US228 US230		
			US329	US329		
			G2 G8	NG135		

* * * * *

c. United States footnote US329 is added:

US329 Wind profiler radars are authorized to operate on a primary basis in the radiolocation service in the frequency band 448-450 MHz with an authorized bandwidth of no more than 2 MHz centered on 449 MHz, subject to the following conditions: 1) wind profiler locations must be pre-coordinated with the military services to protect fixed military radars; 2) wind profiler operations will receive no protection from military mobile radiolocation stations; 3) wind profiler stations will provide protection to military mobile radiolocation stations that are engaged in critical national defense operations; and 4) wind profiler stations will provide the maximum reasonable advance notice, but in no case less than 120 days before commencing transmissions, to all existing fixed amateur repeaters listed in the latest ARRL Repeater Directory that operate between 448-450 MHz within 50 km of the proposed wind profiler site.

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d. Government footnote G2 is revised to include "and US329" and reads as follows:

G2 In the bands 216-225, 420-450 (except as provided by US217 and US329) 890-902, 928-942, 1300-1400, 2300-2450, 2700-2900, 5650-5925 and 9000-9200 MHz, the Government radiolocation is limited to the military services.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PAXSON BROADCASTING
OF ORLANDO, L.P.
(Assignor)

and File No. BALH-930114GF

PRESS BROADCASTING
COMPANY, INC.
(Assignee)

For Assignment of License of
WWNZ(FM), Cocoa Beach, Florida

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 1993; Released: March 29, 1993

By the Commission: Commissioner Marshall not participating.

1. The Commission has before it the above-referenced application for assignment of the license of WWNZ(FM), Cocoa Beach, Florida, from Paxson Broadcasting of Orlando, L.P. ("Paxson") to Press Broadcasting Company, Inc. ("Press"). Press is the licensee of UHF television station WKCF, Clermont, Florida. The Grade A contour of WKCF(TV) encompasses the entire community of Cocoa Beach. Thus, a grant of the assignment applications would result in Press owning attributable interests in a television station and a radio station in the same market in violation of 47 C.F.R. § 73.3555(c), the Commission's one-to-a-market rule.[1] Press has requested a waiver of the rule. The request is unopposed.

2. In support of its waiver request, Press relies on the Commission's decision generally to permit television-radio combinations which meet the "Top 25 Markets/30 Voices" test set forth in *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules ("Second Report and Order")*, 4 FCC Rcd 1741 (1989), *on reconsideration*, 4 FCC Rcd 6489 (1989).[2] Specifically, Press asserts that the Orlando market, which includes Clermont and Cocoa Beach, is the 23rd largest Area of Dominant Influence (ADI) television market and has more than 30 separate radio and television voices. According to an exhibit provided by Press, after its acquisition of WWNZ, there will be more than 30 broadcast stations that are (a) operating in the relevant markets (*i.e.*, with respect to television stations, the Orlando ADI market, and with respect to radio stations, the Orlando Metro Market), and (b) independently owned, and (c) not subject to control or operation by individuals or entities holding another broadcast license in the market(s).[3] Press states that this evidence is derived from the Commission's records, as of the day prior to the filing of its application.

3. In the *Second Report and Order*, the Commission set forth the standard for reviewing waivers of the "one-to-a-market" rule. The Commission concluded that it would "look favorably upon waiver requests when the radio and television stations involved are located in the top 25 ADI television markets as defined by Arbitron Ratings Company and in addition where, following the proposed combination, there will be at least 30 separately owned, operated and controlled broadcast licensees or 'voices'." *Second Report and Order*, 4 FCC Rcd at 1751. To determine the number of voices, the Commission counts all full-power commercial and non-commercial television stations licensed to the relevant ADI television market and the operating AM and FM radio stations licensed to the relevant TV metropolitan market, as defined by the most recent volume of Arbitron's *Television ADI Market Guide*. *Id.* at 1751 and 159 nn.84 and 85. *See generally Arnold L. Chase*, 5 FCC Rcd 1642, 1646 (1990). Furthermore, the attribution provisions of the Commission's local ownership rules are used to determine the number of separately owned, operated, and controlled broadcast licensees or voices in the relevant area. *Report and Order*, 4 FCC Rcd at 1751, 1759 n.87. *See also Capital Cities/ABC, Inc.*, 4 FCC Rcd 5498 (1989). The Commission has determined that "the advantages of permitting radio-television combinations in the top 25 markets, which have numerous competing voices, generally would not undermine the benefits derived from the Commission's traditional pro-competitive and diversity policies." *The Helen Broadcasting Co. Limited Partnership*, 5 FCC Rcd 2829 (1990). *See Cook Inlet Radio Partners, L.P.*, 7 FCC Rcd 2330 (1992); *Group W Radio Acquisition Co.*, 4 FCC Rcd 8343 (1989).

4. We find that the evidence presented by Press demonstrates that the proposed combination will not result in fewer than 30 separately owned, operated and controlled broadcast stations in the Orlando area, which ranks 23rd among the ADI television markets, and which includes Cocoa Beach, the community of license of WWNZ(FM), and Clermont, the community of license of WKCF(TV). Accordingly, Press has provided the necessary documentation to meet the "Top 25 Markets/30 Voices" standard and, in the absence of rebuttal, to demonstrate that waiver of the rule is in the public interest. *See, e.g., Susquehanna Radio Corp.*, 6 FCC Rcd 6547 (1991). Furthermore, Press

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[1] Section 73.3555(c) of the Commission's Rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station.

[2] The "Top 25 Markets/30 Voices" standard is set forth in Note 7 to the one-to-a-market rule. *See* 47 C.F.R. Sec. 73.3555 n.7.

[3] Press submits a list of 46 voices in the market, exclusive of WWNZ(FM) and WKCF(TV). Press notes that one station listed as a "voice," WVRI(FM), Cocoa Beach, is subject to a "local management agreement" with Paxson, who is also the licensee of station WWNZ(AM), Orlando. Press also notes the pendency of applications to assign two stations owned by another voice, Metroplex Broadcasting, to Paxson. Those applications, as well as an application for the assignment of the license of station WVRI(FM) to Paxson, were granted on February 18, 1993.

is otherwise qualified to be a Commission licensee, and, therefore, we find that a grant of the assignment applications would serve the public interest.

5. In view of the foregoing, IT IS ORDERED, That the request for waiver of the Commission's one-to-a-market rule, 47 C.F.R. § 73.3555(c), IS HEREBY GRANTED, and the applications for assignment of the licenses of WWNZ(FM), Cocoa Beach, Florida, from Paxson Broadcasting of Miami, L.P., to Press Broadcasting, Inc., IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cellular Telecommunications Industry Association

Petition for Waiver of Part 61 of the Commission's Rules

Interim Blanket Waiver of the Commission's Rules for Certain Nondominant Common Carriers

ORDER

Adopted: March 30, 1993; Released: March 31, 1993

By the Chief, Common Carrier Bureau:

1. On March 25, 1993, the Cellular Telecommunications Industry Association (CTIA) filed a request for extension of the interim waiver granted by the Common Carrier Bureau (Bureau) on February 19, 1993, which on an interim basis, simplified the federal tariffing requirements as applied to cellular carriers. In its waiver petition, CTIA argued that its request was necessitated by the recent Court of Appeals decision invalidating the Commission's permissive detariffing policy. *See AT&T Co. v. FCC*, No. 92-1053 (D.C. Cir. Nov. 13, 1992). The Bureau granted the requested waiver in part, *inter alia*, permitting cellular carriers to file new tariffs, *i.e.*, those filed for the first time, on less than 45 days' notice for a 60-day period from the release of that order. *See CTIA Waiver Petition for Waiver of Part 61 of the Commission's Rules*, DA 93-196, (Com. Car. Bur. Feb. 19, 1993). CTIA asks that this 60-day period be extended for an additional 90 days. *See* CTIA Request for Extension of Interim Waiver (filed March 25, 1993) at 2.

2. CTIA argues that the interim waiver was granted based on a finding that "real harm could result from applying tariff filing rules governing dominant carriers to cellular carriers" pending the outcome of the proceedings in Federal Communications Commission Rulemaking No. 8179 (RM No. 8179), in which the Commission is considering permanent rules setting forth cellular carriers' federal tariffing obligations. CTIA Request for Extension of Interim Waiver at 1-2. CTIA asserts that the pleading cycle in RM No. 8179 is due to be completed by April 5, 1993, making it unlikely that the Commission will conclude its deliberations in the proceeding prior to April 20, 1993, the date the interim waiver is scheduled to expire. *Id.* at 2. Thus, concludes CTIA, the interim waiver should be extended pending Commission action in RM No. 8179. *Id.*

3. The Bureau has determined that it would be in the public interest to extend the interim waiver period concerning the filing period for new tariffs while the Commission considers permanent rules for cellular carriers.[1] However, CTIA has not demonstrated that an extension of 90 days is warranted. Accordingly, the Bureau will extend the interim period only for an additional 45 days, permitting cellular carriers to file new tariffs on less than 45 days' notice until June 4, 1993.

4. Further, on February 2, 1993, the Commission granted certain nondominant common carriers an interim blanket waiver permitting them to file tariffs on less than 14 days' notice. *See Public Notice*, FCC No. 93-71, (February 2, 1993). The purpose of the blanket rule waiver was to allow nondominant common carriers' tariffs to be filed and take effect quickly so as to bring those carriers into compliance with the court's decision in *AT&T Co. v. FCC*. This waiver is scheduled to expire April 5, 1993. A number of nondominant carriers have continued throughout this period to file tariffs for the first time and we anticipate that there will be a large number of additional filers who have yet to file tariffs. Consequently, the Bureau has determined that, for reasons similar to those stated for cellular carriers, the public interest would be served by extending the interim blanket rule waiver.[2] Accordingly, nondominant common carriers may file their tariffs on less than 14 days' notice until June 4, 1993.[3]

5. Accordingly, IT IS ORDERED that the request for extension of the interim waiver, filed by the Cellular Telecommunications Industry Association, IS GRANTED to the extent indicated herein effective upon release of this order until June 4, 1993, to permit new filings to be made on less than 45 days' notice.

6. IT IS FURTHER ORDERED that the interim blanket rule waiver permitting certain nondominant common carriers to file tariffs on less than 14 days' notice IS EXTENDED until June 4, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[1] The Bureau has already waived the tariff form filing requirements pending action on the rulemaking petition.

[2] Given the Court's decision in *AT&T v. FCC*, we wish to make clear our intent to grant only this limited extension of the interim blanket waiver. We will not grant any further extensions of this waiver. On February 19, 1993, the Commission issued a Notice of Proposed Rulemaking proposing the adoption of a one-day notice requirement for tariff filings of domestic nondominant carriers. Tariff Filing Requirements for Nondominant Common Carriers, *Notice of Proposed Rulemaking*, CC Docket 93-36, FCC 93-103 (Feb. 19, 1993).

[3] Neither of the extensions provided for in this Order create a deadline for the filing of tariffs but merely extend previously granted waivers of minimum tariff notice periods.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-48

In the Matter of

Policies and Rules Concerning
Children's Television Programming

Revision of Programming Policies
for Television Broadcast Stations

ORDER

Adopted: March 31, 1993; Released: April 1, 1993

Comment Date: May 7, 1993
Reply Comment Date: June 7, 1993

By the Chief, Mass Media Bureau:

1. This action extends the deadline for filing comments and reply comments in response to the *Notice of Inquiry* in the above-cited docket (58 Fed. Reg. 14367) pertaining to rules and policies relating to the levels and types of television programming necessary to adequately serve the educational and informational needs of children. The deadline for initial comments was originally set for April 23, 1993, and the deadline for accepting reply comments was May 24, 1993.

2. The National Association of Broadcasters (NAB) requests a two-week extension of the comment periods in order to be able to formulate a fully representative position on behalf of the television broadcast industry. The NAB notes that the press of business has occasioned this request, including the NAB annual convention and the related Law and Regulation Conference.

3. In light of the foregoing, the Bureau finds that good cause exists for an extension. Pursuant to 47 C.F.R. § 0.283, the deadline for filing comments in this proceeding is extended to **May 7, 1993.** The deadline for filing reply comments is extended commensurately until **June 7, 1993.**

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Utah-Wyoming Telecom
and
Kamas-Woodland Telephone Company
and
All West Communications, Inc.

AAD 92-68

Joint Petition for Waiver of the
Definition of "Study Area" contained
in Part 36, Appendix-Glossary, and of
Sections 36.125(f) and 36.154(e)(1)
and (2) of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 1993; Released: April 5, 1993

By the Chief, Accounting and Audits Division:

1. In this Order we consider a petition jointly filed by the Utah-Wyoming Telecom (Telecom), Kamas-Woodland Telephone Company (Kamas-Woodland), and All West Communications (All West) regarding the definition of "study area" contained in the Appendix-Glossary of Part 36, and of allocation factor calculations in Sections 36.125(f) and 36.154(e)(1) and (2) of the Commission's rules to allow the consolidation of Telecom and Kamas-Woodland into a single study area (All West).

I. INTRODUCTION

2. On August 20, 1992, Telecom, Kamas-Woodland and All West filed a petition for waiver of that definition and of accompanying rules.[1] We placed this petition on public notice on September 2, 1992, and received comments in support of the request from one party.[2]

II. STUDY AREA WAIVER

3. The definition of study area contained in Part 36, Appendix-Glossary,[3] of the Commission's rules states that study area boundaries shall be frozen as they were on November 15, 1984. Companies wishing to change their study area boundaries can request a waiver of that rule. The Commission's three primary concerns in study area boundary change petitions are that the change have no adverse impact on the Universal Service Fund (USF) support program,[4] that the state commission(s) having regulatory authority not oppose the change,[5] and that the public interest be served.

4. The service areas in question here are Telecom and Kamas-Woodland. Telecom provides local exchange telephone service to an area including Randolph and Woodruff, Utah, and Cokeville, Wyoming and serves 463 access lines. Kamas-Woodland provides local exchange telephone service in the Kamas Valley area of Utah and serves 1,874 access lines. The petition states that the consolidation will improve operating and administrative efficiencies without any degradation in service quality, resulting in annual cost savings of approximately $12,000 to $15,000.

Universal Service Fund (USF) Impact

5. USF support is calculated based on the cost per loop.[6] The petition states that USF support for the consolidated All West study areas will decrease by $9,668 compared to annual USF support received by Telecom and Kamas-Woodlawn separately. This $0 transfer will, therefore, not have an adverse effect on the USF support program.

State Commission Approval

6. The petition filed by Telecom, Kamas-Woodlawn and All West on August 20, 1992, contains orders by the Public Service Commission of Utah and the Public Service Commission of Wyoming approving the transfer.[7] These commission actions address our concerns regarding state approval.

III. SEPARATIONS FACTOR WAIVER

7. The petition states that since the processing of the present joint petition and the completion of the proposed *pro forma* consolidation are not likely to take place before January 1, 1993, waiver of Section 36.154(e)(1) and (2), 47 C.F.R. §36.154(e)(1) and (2), relating to the computation of the interstate allocation factor, Subscriber Plant Factor (SPF),[8] does not appear to be necessary, since SPFs for both Telecom and Kamas-Woodlawn will be transitioned to 25% by that time.

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[1] Sections 36.154(e) and 36.125(f) of the Commission's rules, which describe allocation calculations, are discussed below.

[2] Public Notice DA 92-1212, released September 2, 1992. Comments filed by the United States Telephone Association (USTA) support the request.

[3] 47 C.F.R. Part 36, Appendix-Glossary.

[4] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325, at para. 65 (December 12, 1984) (*Joint Board Order*).

[5] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 5 FCC Rcd 5974 (1990). The Commission therein describes the factors that led to the present restriction of study area changes and the reasons why it is proposing to change that restriction.

[6] Carriers are eligible for support if their average cost per loop is at least 115% of the national average cost per loop.

[7] Utah PSC Report and Order, Docket No. 91-2180-01, adopted January 3, 1991; Wyoming PSC Notice and Order, Docket No. 70013-TA-91-1, adopted December 20, 1991.

[8] Section 36.154(e)(1) and (2), 47 C.F.R. §36.154(e)(1) and (2), refers to Section 36.154(d) and relates to the computation of the Subscriber Plant Factor (SPF), which is used to effect the transition (1988 to 1992) to 25 percent allocation to interstate

8. The petitioners also believe that a waiver of Section 36.125(f), 47 C.F.R. §36.125(f), relating to the computation of the composite interstate factor used in the separation of Local Switching Equipment - Category 3 (COE Category 3) investment for the transitional period,[9] does not appear to be necessary. They state that since the consolidated All West study area will have fewer than 10,000 access lines, a weighting factor of 3.0 will apply whether or not the subject consolidation takes place.

9. We have reviewed the petitioners' SPF and DEM showings and we find that no waiver of either rule is needed. The transitions to 25% SPF and to DEM are now complete, and the proposed transaction will therefore produce no material effect on separations.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§0.91, 0.291, that the Joint Petition of Utah-Wyoming Telecom, Kamas-Woodlawn Telephone Company and All West Communications, Inc. for waiver of Appendix-Glossary of Part 36 of the Commission's Rules IS GRANTED to the extent set forth above.

11. IT IS FURTHER ORDERED that the Joint Petition of Utah-Wyoming Telecom, Kamas-Woodlawn Telephone Company and All West Communications, Inc. for waiver of Sections 36.125(f) and 36.154(e) of the Commission's rules IS DISMISSED.

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Kenneth P. Moran
Chief, Accounting and Audits Division

for Category 1.3, CW&F, and subscriber loop plant. This transition period may extend beyond the end of 1992 because annual transition rates are capped at 5 percent per year.

[9] Section 36.125(f), 47 C.F.R. §36.125(f), relates to the computation of the composite interstate factor used in the separation of Local Switching Equipment - Category 3 (COE Category 3) investment for the transitional period (1988 through 1992). This transition is from a frozen (1987) composite allocator to a dial equipment minutes (DEM) allocator.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 4742
Revisions to Tariff F.C.C. No. 15
Competitive Pricing Plan No. 12

ORDER

Adopted: April 1, 1993; Released: April 2, 1993

By the Chief, Common Carrier Bureau:

1. On January 21, 1993, AT&T Communications (AT&T) filed the above-captioned tariff revisions which are scheduled to become effective April 3, 1993. This filing introduces AT&T Tariff 15 Competitive Pricing Plan (CPP) No. 12 Option A to provide a 14.2 percent discount off total monthly billed usage charges for domestic Software Defined Network (SDN) Service EVP Part VIIa for a term of three years, with a minimum usage commitment of six million minutes per year. Transmittal No. 4742, Description and Justification (D&J) at 4-5. AT&T states that it is offering CPP 12 Option A in response to an offer made by MCI to Long John Silver's, Inc. D&J at 1-2.

2. On January 28, 1993, MCI Telecommunications Corporation (MCI) and Sprint Communications Company LP (Sprint) filed petitions to reject or, in the alternative, to suspend and investigate Transmittal No. 4742. The petitioners contend that this filing is unlawfully discriminatory for all the same reasons as AT&T's previous Tariff 15 offerings. MCI Petition at 9-15; Sprint Petition at 4-9. The petitioners also protest that AT&T is bundling 800 services in contravention of the Commission's policies as expressed in the interexchange marketplace proceeding. MCI Petition at 8; Sprint Petition at 2-4. Moreover, according to MCI, this offer fails to conform to the competitive necessity test because AT&T beat MCI's offer. MCI Petition at 5-7.

3. Section 61.74(a) of the Commission's Rules, 47 C.F.R. § 61.74(a), provides that no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument. Transmittal 4742 proposes to include new tariff language which makes reference to another tariff publication -- specifically, the rates and regulations effective under AT&T Tariff F.C.C. No. 1. In addition, AT&T failed to request a waiver of the Section 61.74(a) restrictions in order to add this new reference to CPP 12. Therefore, the Bureau concludes that Transmittal 4742 is in violation of Section 61.74(a) of the Rules. It is therefore patently unlawful and is rejected.[1]

4. Accordingly, IT IS ORDERED that, pursuant to Section 202(a) of the Communications Act of 1934, 47 U.S.C. § 202(a), the tariff revisions filed by AT&T Communications in Tariff F.C.C. No. 15, Transmittal No. 4742, ARE REJECTED.

5. IT IS FURTHER ORDERED that AT&T Communications SHALL FILE a supplement reflecting this rejection no later than five business days from the release of this order to be effective on one day's notice. Special Permission No. 93-83 is assigned for this purpose and Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, is waived.

6. IT IS FURTHER ORDERED that the petitions to reject or, in the alternative, to suspend and investigate AT&T Tariff F.C.C. No. 15, Transmittal No. 4742, filed by MCI Telecommunications Corporation and Sprint Communications Company LP ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

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Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] Because we conclude that Transmittal 4742 is unlawful in that it violates Section 61.74(a), we do not reach the other issues raised by the petitioners.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 2, 1993

Rochester Telephone Corporation, Mid-South Telecommunications, Inc. and S & A Telephone Company, Inc. File Joint Petition for Waiver of LEC Price Cap Rules

Pleading Cycle Established

COMMENTS: April 23, 1993
REPLY COMMENTS: May 7, 1993

On March 10, 1993, Rochester Telephone Corporation (Rochester), Mid-South Telecommunications Company, Inc. (Mid-South), and S & A Telephone Company, Inc. (S & A) jointly petitioned for waivers of the Commission's local exchange carrier price cap rules to the extent necessary to effectuate the sale of S & A by Rochester to Mid-South.

Petitioners state that S & A is currently one of Rochester's exchange carrier subsidiaries serving approximately 800 access lines in Allen and Scranton, Kansas. Petitioners further state that Rochester acquired S & A on July 12, 1990, at which time S & A was a cost company that participated in the traffic sensitive and common line pools administered by the National Exchange Carrier Association (NECA).

Petitioners report that at the time Rochester elected price cap regulation, it withdrew its cost-based affiliates, including S & A from NECA Tariff F.C.C. No. 5. The withdrawal became effective on July 1, 1991. Since then, S & A has been governed by the Commission's price cap form of regulation.

Petitioners state that on February 19, 1993, Rochester and Mid-South, which does not currently provide local exchange service, entered into an agreement pursuant to which Mid-South will acquire all of the issued and outstanding shares of S & A from Rochester.

Rochester, Mid-South and S & A request that the Commission waive Sections 61.41(c), 61.41(d), 69.3(c)(11) and 69.4(i)(4) of the Commission's Rules, 47 C.F.R. §§ 61.41(c), 61.41(d), 69.3(c)(11) and 69.4(i)(4), so that, effective upon the acquisition of S & A by Mid-South: (a) S & A may withdraw from price cap regulation and become subject to cost-of-service regulation; and (b) S & A may reenter the NECA traffic sensitive and common line pools and concur in NECA's Tariff F.C.C. No. 5.

Interested parties may file comments regarding the Rochester, Mid-South, and S & A petition no later than April 23, 1993. Reply comments may be filed no later than May 7, 1993.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W.,Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202)632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 4945
Tariff F.C.C. No. 2

ORDER

Adopted: April 5, 1993; Released: April 5, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 23, 1993, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective on April 6, 1993, on 14 days' notice pursuant to special permission granted by the Common Carrier Bureau.[1] This filing introduces a promotion for AT&T Megacom 800 and 800 Gold-Nodal routing arrangement services.

2. On March 30, 1993, MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal No. 4945.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4945 and MCI's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to reject AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 4945, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Application No. 1527 for Special Permission for Continuing Waiver of Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, filed Jan. 22, 1993; Special Permission No. 93-87, granted Jan. 29, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 5, 1993

FLORIDA PUBLIC SERVICE COMMISSION PETITION FOR REVIEW OF TARIFF PROVISIONS RELATING TO LIABILITY FOR TOLL FRAUD CHARGES

The Public Service Commission of the State of Florida (Florida PSC) has petitioned the Commission to review interstate and international tariff provisions relating to liability for toll fraud charges. Specifically, Florida PSC requests review of interstate and international tariff provisions relating to the liability of pay telephone providers for toll fraud charges billed to lines that subscribe to originating line screening (OLS) and billing number screening (BNS) services. Florida PSC has asked the Commission to review these tariffs in conjunction with rules recently adopted by Florida PSC in order to formulate a uniform, multi-jurisdictional resolution to toll fraud liability issues for certain types of fraudulent calls.

Interested parties may file comments concerning the Florida PSC petition within 60 days of the release of this Public Notice. Reply comments should be filed within 30 days thereafter. All filings should refer to File No. 93-TOLL FRAUD-02.

Copies of the petition and any subsequently filed documents in this matter may be obtained from International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. The petition and related documents will also be available for review and copying in Room 6220, 2025 M Street, N.W., any Monday through Thursday, 8:30 a.m. to 3:00 p.m. (closed 12:30 p.m. to 1:30 p.m).

For further information, contact Linda Dubroof at (202) 634-1808.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 13, 1993

PETITIONS FILED SEEKING RECONSIDERATION OF COMMISSION ORDER DENYING PETITION FOR DECLARATORY RULING OF THE NATIONAL EXCHANGE CARRIER ASSOCIATION REGARDING OTHER BILLING AND COLLECTING EXPENSES

FILING DATES FOR OPPOSITIONS AND REPLIES

On January 15, 1993, five parties filed petitions for reconsideration of the Commission's order denying the petition of the National Exchange Carrier Association ("NECA") for a declaratory ruling regarding other billing and collecting ("OB&C") expenses. *Memorandum Opinion and Order,* FCC 92-515 (released December 16, 1992). In its order, the Commission determined that the use of the user count methodology is inappropriate for allocating OB&C expenses to subscriber line charge billing. The Commission also found that that the Common Carrier Bureau's use of a five percent benchmark for allocation of OB&C expense to the Common Line element was reasonable as well as consistent with FCC rules and opinions.

Petitions for reconsideration were filed by NECA, ALLTEL Service Corporation, Bell Atlantic, the National Association of Regulatory Utility Commissioners, and the National Telephone Cooperative Association. Petitioners argue that the user count methodology for allocation of OB&C expenses is reasonable and consistent with the Commission's rules. Petitioners also object to the use of a five percent benchmark for allocations of OB&C expenses, characterizing the benchmark as arbitrary as well as impermissible rulemaking.

Interested parties may file oppositions to the petitions for reconsideration no later than **May 7, 1993**. Replies to oppositions may be filed no later than **May 21, 1993**.

An originial and four copies of all oppositions and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. §1.51(c). In addition, one copy of each pleading must be filed with the Commission's duplicating contractor, International Transcription Service, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Finally, a copy of each filing should be sent to Deborah A. Dupont and to Charles W. Needy, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 257, Washington, D.C. 20036. Copies of the petitions for reconsideration may be obtained from ITS at (202)857-3800.

For further information contact Deborah A. Dupont or Charles W. Needy at (202)632-7500.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-239

In the Matter of

Amendment of Section 73.202(b), RM-8089
Table of Allotments,
FM Broadcast Stations.
(Cusseta, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 17, 1993; Released: April 13, 1993

By the Chief, Allocations Branch:

1. Pursuant to the request of Chattahoochee County Broadcasting ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 6821 (1992), proposing the allotment of Channel 279A to Cusseta, Georgia, as that community's first local FM service. Petitioner filed comments and reply comments. No other comments were received.

2. Petitioner in its comments and reply comments claims that the allotment of Channel 279A to Cusseta would result in a short-spacing to Station WEGC(FM), Channel 279A, Leesburg, Georgia, and therefore, is potentially unavailable for allotment to Cusseta. Petitioner originally requested the allotment of Channel 266A to Cusseta, but that proposal conflicted with pending proposals at Thomaston, Georgia (MM Docket No. 92-227, RM-8072) and Smiths, Alabama (MM Docket No. 92-199). In an effort to accommodate petitioner's proposal, we sought an alternate channel and found that Channel 279A could be allotted to Cusseta at its desired transmitter site.[1] Petitioner argues that its proposal to allot Channel 266A to Cusseta, is entitled to protection until such time as the contingency relating to the availability of Channel 279A is resolved. Petitioner states that it will apply for Channel 266A or 279A, if allotted to Cusseta.

3. We believe the public interest would be served by allotting Channel 279A to Cusseta since it could provide a first local aural transmission service to the community. We also believe that the public interest is best served by termination of this proceeding at this time, rather than by delaying final action until the termination of other conflicting proceedings. As indicated in the *Notice*, Channel 279A can be allotted to Cusseta in compliance with the minimum distance separation requirements of the Commission's Rules without the imposition of a site restriction.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 28, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Cusseta, Georgia	279A

5. The window period for filing applications will open on **June 1, 1993,** and close on **July 1, 1993**.

6. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicant for Channel 278C3 at Leesburg, Georgia, as follows:

Rowland Albany Radio, Inc.
235 Roosevelt Avenue, #501
Albany, GA 31701

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] The substitution of Channel 279A as an alternate channel was made in accordance with Commission practice in which we perform an engineering analysis to see if any alternate channels are available when considering mutually exclusive allotment proposals. *See Pinewood, South Carolina (MO&O)*, 5 FCC Rcd 7609 (1990).

[2] The coordinates for Channel 279A at Cusseta are North Latitude 32-18-18 and West Longitude 84-46-30.

We recognize that the allotment of Channel 279A conflicts with the presently licensed operation of Station WEGC(FM) on Channel 279A at Leesburg, Georgia. However, Station WEGC(FM) was ordered to move to Channel 278C3 at Leesburg, Georgia. *See* MM Docket No. 91-336, 7 FCC Rcd 1972 (1992). Station WEGC has filed an application for construction permit specifying operation on Channel 278C3 at Leesburg (File No. BPH-921125IE). A copy of this *Order* will be served on the licensee of Station WEGC(FM).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-278

In the Matter of

Amendment of Section 73.202(b), RM-8115
Table of Allotments,
FM Broadcast Stations.
(Harlem, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 17, 1993; Released: April 13, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 7839 (1992), issued in response to a petition for rule making filed by GMR Broadcasting, Inc. ("petitioner"), permittee of Station WCHZ(FM) (formerly WHEY), Channel 236A, Harlem, Georgia, proposing the substitution of Channel 236C3 for Channel 236A and the modification of its construction permit to specify the higher class channel. Petitioner filed comments restating its interest in the channel. No other comments were received.

2. We believe the public interest would be served by substituting Channel 236C3 for Channel 236A at Harlem, since it would provide the community with a wide coverage area service. Channel 236C3 can be allotted to Harlem in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.3 kilometers (8.3 miles) northwest,[1] in order to avoid a short-spacing to a construction permit for Station WMKO(FM), Channel 235C3, Millen, Georgia. In accordance with Section 1.420(g) of the Commission's Rules, we are modifying the construction permit for Station WCHZ(FM) to specify operation on Channel 236C3.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 28, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Harlem, Georgia	236C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station WCHZ(FM), Harlem, Georgia, IS MODIFIED, to specify operation on Channel 236C3 in lieu of Channel 236A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, GMR Broadcasting, Inc., permittee of Station WCHZ(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 236C3 at Harlem are North Latitude 33-29-22 and West Longitude 82-25-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-311

In the Matter of

Amendment of Section 73.202(b), RM-8132
Table of Allotments,
FM Broadcast Stations.
(Iron River, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 22, 1993; Released: April 13, 1993

By the Chief, Allocations Branch:

1. At the request of James V. Lien, Norma G. Lien and Lenard G. Harvey ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 345 (1993), requesting the allotment of Channel 297C2 to Iron River, Wisconsin, as that community's first local transmission service. Petitioner filed comments supporting the allotment.[1] No other comments were received.

2. The *Notice* requested that petitioner furnish information to demonstrate that Iron River has the social, economic and cultural indicia to qualify it as a community for allotment purposes. The *Notice* indicated that Iron River is attributed with a population of 900 persons by the 1990 U.S. Census. Petitioner provided information showing that Iron River has its own school, fire and police departments and a weekly newspaper. Further, petitioner shows that Iron River has churches, civic organizations and a shopping area, offers public services to its residents, and operates a tourist information center for visitors to the community and surrounding area. Petitioner also provided a map from the Iron River Business Association showing the business district and major roads in the community.

3. We believe that petitioner has provided us with sufficient indicia to conclude that Iron River is a community for allotment purposes. It is an identifiable population grouping with business and community organizations which identify themselves with the residents of Iron River. *See Garrison, Kentucky*, 6 FCC Rcd 1428 (1991).

4. Channel 297C2 can be allotted to Iron River, Wisconsin, consistent with the minimum distance separation requirements of the Commission's Rules with a site restriction 12.3 kilometers (7.7 miles) east of the community.[2] The site restriction will prevent a short spacing to a proposal to add Channel 296C3 to Moose Lake, Minnesota, in MM Docket 92-220. *See* 7 FCC Rcd 6372 (1992). Since Iron River is located within 320 kilometers of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

5. We believe the public interest would be served by the allotment of Channel 297C2 to Iron River, Wisconsin, since it would provide the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 28, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Iron River, Wisconsin	297C2

6. The window period for filing applications for Channel 297C2 at Iron River will open on **June 1, 1993,** and close on **July 1, 1993**.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In response to the *Notice*, petitioner also provided an affidavit verifying the statements in the petition.
[2] The coordinates for Channel 297C2 at Iron River are 46-35-19 and 91-14-44.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-90

In the Matter of

Amendment of Section 73.202(b), RM-8198
Table of Allotments,
FM Broadcast Stations.
(Toledo, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 22, 1993; Released: April 13, 1993

Comment Date: June 4, 1993
Reply Comment Date: June 21, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by AGPAL Broadcasting Co. ("petitioner"), requesting the substitution of Channel 264C2 for Channel 264A at Toledo, Oregon, and the modification of Station KZUS' license to specify operation on the higher class channel. Petitioner failed to state its intention to apply for the channel, if allotted. It is therefore requested to do so in comments herein.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 264C2 for Channel 264A at Toledo since it could provide the community with a wide coverage area FM service. Channel 264C2 can be allotted to Toledo in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.9 kilometers (4.9 miles) northwest to avoid a short-spacing to Station KICE, Channel 264C1, Bend, Oregon.[2] As requested, we also propose to modify Station KZUS' license to specify operation on Channel 264C2. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 264C2 at Toledo or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Toledo, Oregon	264A	264C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 4, 1993,** and reply comments on or before **June 21, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant; as follows:

AGPAL Broadcasting Co.
P.O. Box 456
Newport, Oregon 97365
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Petitioner is also requested to submit a statement verifying that the information contained in its petition is true to the best of its knowledge, as required by Section 1.52 of the Commission's Rules.

[2] The coordinates for Channel 264C2 at Toledo are North Latitude 44-39-01 and West Longitude 124-01-42.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-229

In the Matter of

Amendment of Section 73.202(b), RM-8083
Table of Allotments,
FM Broadcast Stations.
(Brookings, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 24, 1993; Released: April 13, 1993

By the Chief, Allocations Branch:

1. At the request of KURY Radio, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 6525 (1992), proposing the substitution of Channel 237C2 for Channel 237C3 at Brookings, Oregon, and the modification of Station KURY's license to specify operation on the higher class channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 237C2 for Channel 237C3 at Brookings, since it could provide the community and its environs with expanded radio coverage. Channel 237C2 can be allotted to Brookings in compliance with the Commission's minimum distance separation requirements at the station's licensed transmitter site.[1] As proposed, we will also modify Station KURY's license to specify operation on Channel 237C2.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 28, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Brookings, Oregon	237C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of KURY Radio, Inc., for Station KURY, Brookings, Oregon, IS MODIFIED to specify operation on Channel 237C2, in lieu of Channel 237C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, KURY Radio, Inc., licensee of Station KURY, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 237C2 at Brookings are North Latitude 42-07-23 and West Longitude 124-17-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 7, 1993

Commission Opens Filing Window For Commercial Operator License Examination Managers

On January 14, 1993, the Commission adopted a *Report and Order* (R&O) in FO Docket No. 92-206 privatizing the administration of license examinations for Commercial Radio Operators. In the R&O the Commission delegated authority to the Chief, Private Radio Bureau to certify a number of private entities to be Commercial Operator License Examination Managers (COLEMs) and stated that it would announce a filing window for accepting requests from these entities. The Commission also noted that certification of an entity as a COLEM would be through the use of a Memorandum of Understanding (MOU).

The purpose of this Public Notice is to announce that the Commission will accept requests from entities that want to be certified as a COLEM beginning April 12, 1993, and ending May 7, 1993. Requests received before or after these dates will not be considered. Depending on the number of requests received, however, the Commission may determine additional COLEMs would be beneficial and open another filing window in the future. Entities interested in becoming a COLEM should familiarize themselves with the Commission's R&O before applying.

All requests for certification must include a description of (1) the entity and its qualifications, (2) how it will prevent any conflict of interest, (3) how examinations will be administered, (4) the geographic areas where it proposes to administer examinations, what examination elements it proposes to provide, the frequency of the examination sessions, and (5) its proposed fee structure. In addition, each request must be signed and include the name and telephone number of a person familiar with the request. Requests must be sent to the Federal Communications Commission, Private Radio Bureau, Personal Radio Branch, Room 5322, Washington, DC 20554, ATTENTION: COLEM. Failure to follow these filing procedures will result in the request not being considered.

If the Commission receives more requests to become COLEMs than administrative efficiency permits it to grant, the Commission will base its decision on the information provided in the requests. Once a decision has been made, the names and addresses of certified COLEMs will be announced in a Public Notice.

For further information, call William T. Cross at (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendments to Parts 0, 1, 21, and 74
of the Commission's Rules

ERRATUM

Released: April 13, 1993

By the Chief, Private Radio Bureau:

1. On March 22, 1993, the Commission released an *Order*, FCC 93-110, in the above-captioned proceeding amending, among other sections, Section 0.453(l) of the Commission's Rules. It inadvertently failed to take into account minor revisions to Section 0.453(l) made pursuant to an earlier *Order* released a few days prior to the time the instant *Order* was adopted. *See Order*, DA 92-1115, released February 5, 1993. This *Erratum* corrects Section 0.453 to account for those revisions. The corrected text of Section 0.453 is attached as Appendix A hereto.

2. Because this rule change corrects errors, omissions, or inconsistencies and because this rule change relates to agency organization, procedure, or practice, the notice and comment and effective date provisions of the Administrative Procedure Act are inapplicable. *See* 5 U.S.C. §553(b)(A), 553(d).

3. Accordingly, IT IS ORDERED THAT, Part 0 of the Commission's Rules IS AMENDED as set forth in the appendix, effective upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Andrew T. Fishel
Managing Director

APPENDIX

Part 0 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 0 continues to read as follows:

Authority: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.453 is amended to read as follows:

Section 0.453 Public Reference Rooms

* * * * *

(l) The Private Radio Bureau Reference Room. Commercial radio operator application files and all authorizations in the Private Radio Services and files relating thereto, which includes Land Mobile, Microwave, Aviation Ground and Marine Coast applications. All of these materials are available in the Commission's offices in Gettysburg, Pennsylvania. See Section 0.457(f)(3). This reference room also contains station files containing applications and related materials for Remote Pickup, Aural STL/ICR, TV Auxiliary, and Low Power Auxiliary Stations in the Mass Media services. This reference room also contains station files containing applications and related materials for the Point-to-Point Microwave (including the Local Television Transmission Service) and Digital Electronic Message (DEMS) services in the Common Carrier services. Cards summarizing the historical record of applications and dispositions of the Broadcast Auxiliary service through May 1982 are available for inspection as well.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 1 — Transmittal Nos. 4906 and 4999

ORDER

Adopted: April 6, 1993; **Released: April 6, 1993**

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 11, 1993, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing revises AT&T's Software Defined Network Service Expanded Volume Plan to include the fresh look option provided in that Order.[2] The transmittal is scheduled to become effective on April 7, 1993.[3]

2. On March 18, 1993, MCI Telecommunications Corporation filed a petition to reject, and Sprint Communications Company LP filed petitions to reject or, in the alternative, to suspend and investigate Transmittal No. 4906. AT&T replied on March 23, 1993.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4906 and all associated pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to reject or to suspend and investigate AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 4906, filed by MCI Telecommunications Corporation and by Sprint Communications Company LP ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

[2] *Id.* at 7 FCC Rcd 2677.

[3] The Bureau deferred the effective date of Transmittal 4906 to April 7, 1993. AT&T subsequently filed revisions to Transmittal 4906 which clarify the fresh look provisions of the tariff. AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 4999 (filed Apr. 5, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Petition of

Jose M. Oti, d/b/a Sandino Telecasters

For Termination of Authorization of
Angeles Broadcasting Network,
Interim Licensee of Station KAGL(TV),
San Bernardino, California

MEMORANDUM OPINION AND ORDER

Adopted: April 1, 1993; Released: April 12, 1993

By the Commission: Commissioner Marshall not participating.

1. The Commission has before it a petition for reconsideration of the June 26, 1992 letter of the Assistant Chief, Video Services Division, directing Angeles Broadcasting Network (Angeles), interim licensee of station KAGL(TV), channel 30, San Bernardino, California, to terminate operation of the station within 60 days. The petition has been referred to the Commission, pursuant to Section 1.104(b) of the Commission's Rules.[1] Jose M. Oti, d/b/a Sandino Telecasters (Sandino), permittee of unbuilt station KZKI(TV), channel 30, San Bernardino, opposes the petition. We also have before us several related pleadings. For the reasons stated below, we deny Angeles' petition for reconsideration.

2. In 1980, the Commission dismissed the application of Faith Center, Inc. to renew the license of station KHOF-TV, channel 30, San Bernardino. *Faith Center, Inc.*, 82 FCC 2d 1 (1980), *recon. denied*, FCC 81-235 (released May 12, 1981), *aff'd per curiam*, 679 F.2d 261 (DC Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983). In 1986, the Commission granted Angeles interim authorization to broadcast on channel 30 until a permanent licensee could be found. *Angeles Broadcasting Network*, 61 RR 2d 480 (1986). Afterwards, Sandino was awarded the permanent construction permit, which specified a site on Sunset Ridge, an antenna farm in a mountainous area controlled by the U.S. Forest Service and the site of Angeles' interim facilities. *Religious Broadcasting Network*, 5 FCC Rcd 6362 (Rev. Bd. 1990).

3. By letter to the Commission dated February 10, 1992, Sandino asserted that, because of U.S. Forest Service restrictions, the only site available was the one currently occupied by Angeles and specified in Sandino's construction permit, and that the Forest Service would not permit construction of Sandino's tower at that site until Angeles' tower was dismantled. The permittee therefore requested termination of Angeles' interim authorization to allow Sandino to begin construction. The Forest Service also filed a letter that stated, among other things, that Sandino's construction was estimated to take six months to complete. By letter dated June 26, 1992, the staff found that Sandino could not commence construction until Angeles ceased broadcasting and vacated the site, and it thereby directed Angeles to terminate operation.

4. In support of its petition for reconsideration, Angeles alleges that the staff improperly assumed that Sandino could operate only from the site currently used by the interim licensee. Angeles states that Sandino should show cause why it cannot build at an alternative site (the Marston site) not on Sunset Ridge that the interim licensee proposes, thus allowing Angeles to operate until construction is complete and thereby preventing disruption in service. Angeles asserts that Sandino could broadcast from the Marston site in full compliance with the Commission's Rules, allow the interim licensee to continue operating, and prevent a temporary loss of service over channel 30.

5. In response, Sandino has submitted an engineering study showing that the City Grade contour of a facility operating at maximum power from the Marston site would reach only 27% of the population that the Sunset Ridge facility would reach. The study also shows that the Grade B contour would encompass only 76% of the population that the Sunset Ridge facility's Grade B contour would reach. In addition, Sandino argues that its authorized use of Sunset Ridge has priority over that of an interim operator, because the latter exists only as a temporary bridge between permanently authorized licensees. We find that Sandino could operate from the Marston site in compliance with the Commission's rules. However, based on the evidence before us, it appears that Sandino's coverage from that site would be significantly inferior to that to which it is currently authorized. We find that Angeles has not demonstrated the availability of another site from which the permittee could provide as good or better service as from the authorized site, and we will not compel an authorized permittee to relocate its proposed site to an inferior location simply to serve the wishes of an interim licensee.[2]

6. Angeles next contends that Sandino may not have access to the Sunset Ridge site even if Angeles' interim authorization is terminated. According to Angeles, Sandino has not shown that it will be able to reach an

[1] The Commission recently denied Angeles' application for review of the staff's denial of its motion for stay of the June 26 order. *Jose M. Oti, d/b/a/ Sandino Telecasters*, 7 FCC Rcd 6885 (1992). Accordingly, Angeles ceased operation of KAGL(TV) on August 26, 1992.

[2] Angeles' arguments regarding the Marston site are based upon a July 22, 1992 letter written by engineer W. Bernard Marston. In an unsworn letter dated August 5, 1992, Marston elaborates on the Marston site, recites his familiarity with the Sunset Ridge area, and then asserts that space is available at "that site" (presumably another site located on Sunset Ridge). Angeles contends that Marston's August letter confirms the availability of another site on Sunset Ridge at which Sandino could construct, thereby allowing Angeles to continue operating. However, Marston's letter is unsworn, and it provides no specific facts to support the assertion that another site is available on Sunset Ridge. Accordingly, we find that Angeles has not demonstrated that Sandino can construct its facilities at a site elsewhere on Sunset Ridge.

agreement with Dolores Press, Inc. (Dolores Press), the holder of the Forest Service use permit for the site, to construct the facilities. In that regard, Angeles asserts that Dolores Press will find another Commission licensee to use the site. Angeles also claims that several environmental issues would be raised against Sandino in opposition to any attempt to obtain a Forest Service permit. In addition, Angeles states that action is being taken to have the site declared a historical monument, thereby precluding construction by Sandino.

7. In response, Sandino has submitted copies of the special use permits granted to Dolores Press and Angeles by the Forest Service. Both permits are expressly contingent upon the holder's having the applicable Commission (or Interdepartment Radio Advisory Committee) authorization. According to Sandino, the special use permits will discontinue by their own terms upon termination of Angeles' interim authorization, and therefore it need not reach any agreement with Dolores Press. Sandino nevertheless states its willingness to negotiate, if required, with Dolores Press and Angeles to expedite use of the site and the leasehold improvements located there.

8. Applicants such as Sandino are expected to have a "reasonable assurance" that its proposed site will be available. *Mount Wilson FM Broadcasters, Inc. v. F.C.C.*, 884 F.2d 1462, 1463 (D.C. Cir. 1989); *Elijah Broadcasting Corp.*, 5 FCC Rcd 5350, 5351 (1990). The permittee has asserted that Dolores Press will no longer hold the Forest Service use permit once Angeles' authorization terminates. Nothing in the record suggests that the Forest Service will allow Dolores Press to retain its use permit after termination of the interim authorization. In addition, we note that in awarding the construction permit to Sandino, we found that the permittee had complied with the appropriate environmental regulations. We therefore find that Angeles has not established that Sandino lacks a "reasonable assurance" of site availability.[3]

9. Angeles next argues that it relied on a June 19, 1991 staff letter stating that its interim authorization would continue until Sandino commenced actual construction and the Commission terminated Angeles' interim authorization. Angeles states that it entered into programming and other contracts based upon that letter, and that it will be placed in a difficult position with programmers and others if its authorization is terminated. However, we note that Angeles' status as an interim licensee has always been a matter of public record. Both Angeles and the parties with whom it has executed contracts have had reason to know that its interim authority would ultimately be terminated in order to meet the construction needs of the permanent operator. We find that any reliance upon the longer term prospects of Angeles' operating authority, more than 18 months after the staff's letter, was therefore not reasonable. In any event, the public interest required taking a different approach than the staff letter.

10. Angeles next asserts that the public will be harmed by the loss of Angeles' programming service to the Korean community, which it states was damaged by the recent rioting in Los Angeles. In that regard, Angeles also states that it broadcasts the only prime time Korean programming in its service area.[4] In response, Sandino alleges that the merits of the interim operator's programming are not relevant to whether the permittee can commence construction while Angeles is still operating. Sandino also contends that, like Angeles, it will broadcast in the public interest.

11. We agree that the interim licensee's current programming has no bearing on whether its operation impedes Sandino's construction. We regret that the commencement of operations by the authorized permittee will require a brief hiatus in service to the public. However, we believe that further delay in construction will disserve the people of San Bernardino, who for the past decade have gone without a permanent channel 30 operation. *See Faith Center*, above.

12. Angeles next disputes the staff's assertion that Sandino stated that it would commence operation within six months of termination of Angeles' interim authorization. Angeles claims that Sandino made no such representation. Moreover, Angeles claims that Sandino cannot complete construction within six months, because of weather conditions, difficult terrain, and Forest Service regulations. In that regard, Angeles has submitted the statement of a local contractor, who estimates that construction would take approximately 16 months to complete. In response, Sandino states that the length of time required for construction was not a dispositive issue in the staff's decision. The permittee further states its belief that it will be able to complete construction within six months of receiving a permit from the Forest Service. Sandino also asserts that the restricted access to the site necessitates an immediate start to construction.

13. We find that the time it takes Sandino to construct its facilities has no bearing on whether it can begin that process while Angeles is still operating. We note that the permittee has two years to construct its authorized facilities. However, given the temporary loss of service involved in this case, we encourage Sandino to begin providing service to the residents of San Bernardino as soon as possible. In that regard, we note Sandino's estimate that, in spite of the potential difficulties, it will complete construction within six months of receiving Forest Service authorization.[5]

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[3] Angeles makes several allegations regarding potential violations of environmental regulations, should Sandino construct at the proposed Sunset Ridge site. These arguments are essentially the same as those raised by San Bernardino Mountains and Environment Preservation Society, Inc. (Preservation Society) in requesting the staff to stay its initial directive for Angeles to cease operations. The staff rejected those arguments, finding that no specific evidence had been raised that any environmental regulation might be violated. The staff also found that Preservation Society had failed to demonstrate that the site might qualify for placement on the National Register of Historic Places, and therefore impede Sandino's construction plans. These conclusions were unanimously upheld by the Commission. *See Jose M. Oti*, above.

[4] Angeles asserts that it provides 19 hours of Korean programming per week, between 6:00 PM and 9:00 PM.

[5] Angeles notes that this estimate is not sworn or supported by a statement from a principal. We nevertheless regard the statement as a representation of Sandino's current plans that, because Sandino is a Commission permittee, we may properly credit. *See Bilingual Bicultural Coalition on Mass Media, Inc. v. F.C.C.*, 595 F.2d 621, 635 (D.C. Cir. 1978) (*en banc*). In any

14. Finally, Angeles asserts that if Sandino is allowed to begin construction at the site now occupied by the interim licensee, then the Commission should allow Angeles to operate from another site until Sandino is ready to begin actual broadcasting. In that regard, we note that Angeles has submitted no such application. Moreover, any such facility would be operational for only a very limited time. We do not believe that the public interest would be served by the expenditure of our resources in the processing of such an application and the expenditure of substantial funds by the applicant for a facility that will operate for such a limited time.

15. In conclusion, we emphasize that interim operations are granted solely to provide service on a temporary basis until a permanent operator can be selected. Angeles' interim operation has served its intended purpose by providing such a temporary service since 1986. However, Sandino is now ready to begin construction of its authorized facilities, and the action we are taking is to facilitate operation by the authorized permittee. Angeles is now, by its own actions, seeking to preclude construction of Sandino's authorized facilities. Its efforts in this regard are not consistent with the character and purpose of interim authorizations. Therefore, for the reasons stated above, we deny Angeles' petition.[6]

16. In view of the foregoing, IT IS ORDERED that the petition for reconsideration, when considered as an application for review, filed by Angeles Broadcasting Network IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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event, as we stated above, the time necessary for construction has no bearing on whether it can begin that process while Angeles is still operating.

[6] In its reply to Sandino's opposition, Angeles makes speculative assertions regarding an unauthorized transfer of control of the permittee and whether Sandino plans eventually to assign its construction permit. The former issue is unrelated to the matters raised in Sandino's opposition. Although we could strike that section of Angeles' pleading pursuant to Section 1.106(h) of the Commission's Rules, we nevertheless find that Angeles has not made a *prima facie* case. With regard to the latter issue, we note that a permittee has the right to assign its permit, pursuant to Section 73.3535 of the Commission's Rules. The matter raised by Angeles bears no relation to whether the authorized facilities will be constructed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-59

In the Matter of

Amendment of Section 73.202(b),	RM-7923
Table of Allotments,	RM-8042
FM Broadcast Stations.	
(Bradenton and High Point, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 23, 1993; Released: April 14, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 2198 (1992), filed by Sunshine State Broadcasting Company, Inc. ("Sunshine"), proposing the substitution of Channel 278C for Channel 277C1 at Bradenton, Florida, and modification of Station WDUV(FM)'s license to specify Channel 278C. Sunshine filed comments restating its intention to apply for Channel 278C, if allotted. Entertainment Communications, Inc. ("Entercom"), licensee of Station WYUU(FM), Channel 223C2, Safety Harbor, Florida, filed opposing comments. High Point Broadcast Partners ("High Point") filed a counterproposal requesting the allotment of Channel 275A to High Point, Florida as that community's first local service, which was subsequently withdrawn.[2] Entercom and Sunshine filed consolidated reply comments.[3]

2. In its comments, Entercom argues that the proposed substitution of Channel 278C for Channel 277C1 fails to satisfy the Commission's technical rules and the Federal Aviation Administration's ("FAA") limitations on tall towers within the permissible site zone for Channel 278C. Entercom states that according to an aeronautical study conducted by its engineering consultant a tower at the proposed coordinates would exceed FAA obstruction standards by 500 feet, and result in a height that increases the minimum instrument flight altitude within the terminal area by 400 feet. In addition, the radar vectoring altitude throughout the site zone is currently 1600 feet AMSL; the tower proposed by Sunshine would require an increase of the radar vectoring altitude to 2000 feet AMSL, which the FAA might not approve.

3. In response, Sunshine challenges Entercom's allegations as failing to establish that there would be an adverse aeronautical determination throughout the entire area in which a transmitter could be located. Specifically, although conceding that Entercom is correct in its assessment that some areas within the allowable area may have limitations, Sunshine states that Entercom's assessment is flawed in that it fails to define those areas. Furthermore, Sunshine states that, contrary to Entercom's allegation, a tower at the reference site would not require a change to existing departure procedures at Peter O Knight Airport. Additionally, Sunshine states that Entercom's 1600 foot vectoring altitude analysis failed to take into account the closing of Mac Dill Air Force Base, the primary beneficiary of the 1600 foot vectoring altitude.

4. In opposition, Entercom attacks Sunshine's reference site as unsuitable for construction of a tower meeting minimum Class C requirements, and states that the suitability of this site establishes that Sunshine is unable to locate a fully-spaced transmitter site for its Class C proposal. In support of its allegation that the reference site is unsuitable, Entercom submits a preliminary finding of the FAA that states that the proposed construction would exceed FAA standards and is presumed to be a hazard to air navigation pending further study to prove the contrary. The FAA analysis also indicates that the proposed frequency could cause "hazardous three signal/third order intermodulation interference resulting in navigation receiver overload" to certain aircraft when landing on certain runways at the St. Petersburg Clearwater International Airport, Lakeland Linder Regional Airport and Tampa International Airport. Therefore, Entercom argues that the Sunshine proposal should be denied.

5. In its reply Sunshine maintains that the FAA finding is not a conclusive determination of hazard, but a preliminary determination based on the tower height. Additionally, Sunshine challenges the *bona fides* of Entercom in seeking out this preliminary determination by making a false certification to the FAA with respect to Sunshine's reference site. Finally, Sunshine argues that not only does the FAA finding fail to establish that its reference site is unavailable, but also that the FAA finding fails to establish that there is no site available for construction of its tower. Sunshine further argues that Entercom erroneously

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[1] The community of High Point has been added to the caption.

[2] Public Notice of the counterproposal was given on July 24, 1992, Report No. 1901.

Sunshine and High Point filed a joint request for approval of a settlement agreement in which High Point withdrew its counterproposal. In accordance with Section 1.420(j) of the Commission's Rules, Sunshine states that it has not paid or promised to pay money or other consideration in excess of the legitimate and prudent expenses incurred by High Point in filing its rule making petition. Therefore, we will dismiss High Point's counterproposal and need not consider pleadings responding to the counterproposal.

[3] After the record closed, Entercom filed an Opposition to Joint Request for Approval of Settlement Agreement, or, Alternatively, Supplement to Comments of Entertainment Communications. Sunshine filed a Motion to Strike and a Reply to Opposition to Joint Request for Approval of Settlement Agreement, or, Alternatively, Supplement to Comments of Entertainment Communications. Entercom filed Consolidated Opposition to Sunshines Motion to Strike and Response to Reply. Sunshine filed a Reply to Consolidated Opposition to Motion to Strike and Reponse to Reply. Although, the Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period, we will consider the arguments raised herein, in order to have a complete record in this proceeding.

has cited *West Palm Beach, Florida*, 6 FCC Rcd 6975 (1991) and *Crestview and West Bay, Florida*, 7 FCC Rcd 3059 (1992) in support of Entercom's arguments that the issue of the suitability of a particular site is required before an allotment will be made. Sunshine argues that *West Palm Beach* holds that the Commission will follow its usual practice of deferring to the application stage a determination as to the suitability of a transmitter site unless a party makes a showing that no theoretical sites exist, and that in *West Palm Beach*, as here, no showing was made. Further, Sunshine argues, in denying an allotment in *Crestview and Westbay*, the Commission found that while the reference site was technically unfeasible for use as a transmitter site, the basis for denial was not the infeasibility of that particular site but that there was no fully spaced feasible site for the channel to be allotted at that community. Thus, in that case, the presumption that a feasible site is available was rebutted. Here, Sunshine argues, Entercom has failed to show that no feasible site is available.

6. We believe the public interest would be served by substituting Channel 278C for Channel 277C1 at Bradenton, Florida. Sunshine correctly argues that Entercom has not established that the reference site is infeasible or that there are no feasible sites for the allotment of a channel. *See Crestview and Westbay*, and *West Palm Beach*. Therefore, in accordance with past practice, we find that the issues concerning FAA permissible site zoning problems are more appropriately addressed at the application stage where a specific transmitter site is before the Commission and the FAA. Channel 278C can be allotted to Bradenton, Florida, in compliance with the Commission's minimum distance separation requirements with a site restriction of 41.7 kilometers (25.9 miles) northeast[4] in order to avoid a short-spacing to a construction permit for Station WQOL(FM), Channel 279C2, Vero Beach, Florida, and the licensed site of Station WRUF(FM), Channel 279C1, Gainesville, Florida. Channel 278C at Bradenton would be short-spaced to Channel 279C2, Station WXKB(FM), Cape Coral, Florida. However, Station WXKB(FM) was ordered in MM Docket No. 88-512 to specify operation on Channel 280C1. *See* 6 FCC Rcd 6966 (1991). The grant of an authorization for Channel 278C at Bradenton, Florida, may be withheld until Station WXKB(FM) is licensed on Channel 280C1 at Cape Coral, Florida. We shall modify the license for Station WDUV(FM) to specify Channel 278C in accordance with Section 1.420(g) of the Commission's Rules.

7. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 28, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Bradenton, Florida	278C

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WDUV(FM), Bradenton, Florida, IS MODIFIED, to specify operation on Channel 278C in lieu of Channel 277C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

9. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Sunshine State Broadcasting Company, Inc., licensee of Station WDUV(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

10. IT IS FURTHER ORDERED, That the petition for rule making filed by High Point Broadcast Partners (RM-8042) seeking the allotment of Channel 275A to High Point, Florida, IS HEREBY DISMISSED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[4] The coordinates for Channel 278C at Bradenton are North Latitude 27-49-20 and West Longitude 82-21-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Emergency Petition for Declaratory Ruling, or, Alternatively, Petition for Waiver filed by Teleport Communications Group

ORDER

Adopted: March 26, 1993; Released: April 6, 1993

By the Commission:

I. INTRODUCTION

1. In the *Expanded Interconnection Order*,[1] we adopted a rule prohibiting the carriage of switched access traffic over interconnectors' transmission facilities connected to special access expanded interconnection offerings -- a practice we referred to in the *Order* as "ratcheting."[2] Teleport Communications Group (Teleport) requests a declaratory ruling that the NYNEX telephone companies (NYNEX)[3] may not refuse to provide interstate switched access service to Teleport at Teleport's facilities collocated in NYNEX central offices, arguing that the *Expanded Interconnection Order* 's prohibition of ratcheting does not implicate how Teleport currently interconnects with NYNEX switched services.[4] In the alternative, Teleport requests a partial waiver of the ratcheting prohibition to enable Teleport to order interstate switched services to its collocated facilities that were established in New York Telephone Company (NYT) central offices prior to the adoption of the *Order*.

2. For the reasons stated below, we grant Teleport a waiver of Section 64.1402(c) to permit Teleport to use interstate special access expanded interconnection offerings to connect its collocated transmission facilities with NYNEX interstate switched circuits to the extent that: (1) Teleport had placed written orders for such connections before the date the *Order* was adopted, or (2) Teleport needs such connections in order to fulfill the requirements of contracts with its customers entered into in reliance on existing NYNEX offerings before the date the *Order* was adopted. On our own motion, we also waive Section 64.1402(c) to permit other interconnectors to connect their collocated facilities with NYNEX interstate switched circuits if they satisfy either of the same two criteria.

II. POSITIONS OF THE PARTIES

3. Teleport asserts that NYNEX has refused to provide interstate switched access service to Teleport's facilities physically collocated in NYNEX central offices.[5] According to Teleport, a large interexchange carrier (IXC) selected Teleport over NYNEX after a competitive request for proposals to improve its New York area network for switched and special access facilities. Teleport alleges that NYNEX, in an attempt to frustrate nascent competition, has recently denied Teleport the switched interconnections it needs to provide service to its IXC customer.[6]

4. In support of its request for a declaratory ruling, Teleport argues that the ratcheting provisions of the *Expanded Interconnection Order* do not justify NYNEX's refusal to provide service. Teleport asserts that "ratcheting" refers to a method used to adjust the price of special access service to reflect the simultaneous use of a circuit for special access and switched access, and argues that no such ratcheting would occur on the circuits it intends to connect to NYNEX's switched access circuits, which would be dedicated to switched access.[7] Teleport also argues that the *Order* has no relevance to its existing collocated facilities in NYNEX central offices, which, according to Teleport, are provided pursuant to private contracts between Teleport and NYNEX.[8] Teleport states that these contracts are governed by state law and explicitly permit Teleport to order NYNEX interstate switched access services to terminate in the collocated facilities.[9]

5. In the alternative, Teleport requests a waiver to enable it to obtain NYT's interstate switched services. Teleport characterizes this waiver as enabling NYT to carry out its commitment that Teleport would be able to order switched services to collocated facilities, pursuant to contracts between Teleport and NYT made prior to the adoption of the *Expanded Interconnection Order*.[10] Teleport asserts that a waiver would not subject NYT to the loss of any significant amounts of revenue because Teleport would compete only for the mileage element of local transport while paying NYT for the remaining transport charges. Teleport states that in a typical configuration, the distance-sensitive portion of NYT's local transport charge is about 6% of the total charge, which, according to Teleport, reflects less distance sensitivity than NYT's special access rates.[11] Moreover, Teleport contends that failure to grant the waiver would require Teleport and NYT to construct additional, unnecessary facilities to

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[1] *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order* or *Order*), recon., 8 FCC Rcd 127 (1992), pets. for recon. pending, appeal pending sub nom. *Bell Atlantic Corp. v. FCC*, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992).

[2] 47 C.F.R. § 64.1402(c). *See also Order*, 7 FCC Rcd at 7419-21, ¶ ¶ 105, 108-09.

[3] The NYNEX telephone companies are the New York Telephone Company and the New England Telephone and Telegraph Company.

[4] Emergency Petition for Declaratory Ruling, or, Alternatively, Petition for Waiver, filed by Teleport Communications Group (Nov. 25, 1992) (Teleport Petition).

[5] *Id.* at 1.

[6] Letter from Robert C. Atkinson, Senior Vice President, Teleport Communications Group, to Alfred C. Sikes, Chairman, FCC (Nov. 10, 1992) (Teleport Letter) at 4-5.

[7] *Id.* at 3-4.

[8] Teleport Letter at 2.

[9] *Id.* at 1-2.

[10] Teleport Petition at 4.

[11] Teleport Petition at 5-6.

enable NYT to provide switched transport service to Teleport facilities located close to NYT central offices.[12] In addition, Teleport asserts that failure to grant the waiver would require a fruitless bifurcation of switched access calls by jurisdiction and would interfere with New York's intrastate expanded interconnection policies, which permit collocated interconnection with switched services.[13] Finally, Teleport argues that a waiver would be appropriate to allow Teleport to realize the benefit of the bargain it made with NYT, given that in reliance on its contracts with NYT, it invested considerable amounts to construct collocated facilities in NYT central offices in order to use those facilities for interstate switched access.[14]

6. NYNEX responds that it has not refused to provide switched access services to Teleport under its standard tariff provisions, which provide for an interconnection point outside its central office.[15] It states that prior to the adoption of the *Order*, NYNEX had interpreted its tariffs to enable Teleport to obtain interstate switched service at its collocated facilities, but that pursuant to the *Order*, it has ceased to process orders for switched access circuits to Teleport's collocated facilities.[16] NYNEX contends that Teleport ratchets switched and special access traffic together in its collocated multiplexers, and that although individual circuits remain switched or special, they share the same physical facilities.[17] According to NYNEX, both the *Order*'s rationale in prohibiting interconnector ratcheting -- to avoid forcing the LEC per minute charge to compete against competitive access providers' (CAPs') flat rate charges -- and the rule codifying that prohibition make it clear that NYNEX's interpretation of the *Order* is correct. Finally, NYNEX asserts that the contract between it and Teleport governing use of the collocated space is expressly subject to the rules and orders of the FCC, and that New York state policy cannot preempt federal policy.[18] NYNEX does not oppose Teleport's request for a limited waiver to permit it to "grandfather" existing connections of switched access circuits to its collocated facilities and to fulfill the requirements of contracts entered into before the adoption of the *Order*, but NYNEX opposes the broad waiver sought by Teleport.[19]

7. MFS Communications Company, Inc. (MFS) supports Teleport's request for a declaratory ruling, agreeing that permitting interconnectors to connect switched access circuits to their collocated facilities is consistent with both the language of the *Order* and the public interest.[20] MFS argues, however, that in the event the Commission does not clarify the *Order* in this manner, a company-specific waiver for Teleport would be inappropriate because there are no unique circumstances that justify a departure from the general standard for Teleport alone.[21] MFS also opposes a limited waiver such as a "grandfather clause," asserting that while it concurs with Teleport's general policy arguments, the proper remedy is to change the rule, not to grant a preferential waiver to one (or a few) competitors.[22]

8. Southwestern Bell Telephone Company (SW Bell) opposes Teleport's petition, asserting that the *Order* explicitly forbids interconnectors from doing precisely what Teleport seeks to do.[23] SW Bell contends that granting a waiver would effectively reverse the Commission's conclusions, and that the Commission has decided to address interstate switched transport collocation in a separate phase of the proceeding that is currently underway.[24]

III. DISCUSSION

A. Petition for Declaratory Ruling

9. Teleport's request for a declaratory ruling asks for an interpretation of what we meant in prohibiting "ratcheting" by inter-connectors, as codified in Section 64.1402(c) of the Commission's Rules. Teleport and MFS read the *Order* as not preventing interconnectors from having LEC switched circuits terminated at their collocated facilities, but only prohibiting connections with interconnector circuits containing both special access and switched transport traffic. The language of the rule, however, makes it clear that Teleport's and MFS's interpretation is incorrect. The rule provides that "[i]nterconnectors shall not be allowed to use interstate special access expanded interconnection offerings to connect their transmission facilities with the local exchange carrier's interstate switched services."[25]

10. Teleport's and MFS's suggested interpretation of the *Order* is also inconsistent with the rationale underlying our prohibition of interconnector ratcheting. We found that although expanded interconnection for special access was in the public interest, additional proceedings were needed before we can decide whether to go forward with expanded interconnection for switched transport.[26] The ratcheting prohibition enabled us to require collocated

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[12] *Id.* at 6-8. Teleport also argues for the application of "fresh look" principles, under which NYNEX's termination liabilities and other nonrecurring charges would not apply when Teleport relocates switched access facilities from additional Teleport points of presence established in close proximity to NYNEX central offices, into collocated facilities in central offices. *Id.* at 7 n.20.

[13] *Id.* at 8-9.

[14] *Id.* at 9.

[15] Reply of the NYNEX Telephone Companies to Teleport Emergency Petition for Declaratory Ruling and Petition for Waiver (Dec. 7, 1992) (NYNEX Reply) at 2. NYNEX also denies that it is attempting to frustrate competition by impeding the rollover of the IXC's circuits to Teleport. Letter from Frank J. Gumper, Managing Director-Federal Regulatory, Telesector Resources Group, to Alfred C. Sikes, Chairman, FCC (Nov. 17, 1992) (NYNEX Letter) at 4.

[16] NYNEX Reply at 2.

[17] *Id.* at 3-4.

[18] *Id.* at 5-6.

[19] *Id.* at 6-7. NYNEX opposes Teleport's request that NYNEX be required to waive nonrecurring charges, asserting that there is no reason to force NYNEX to subsidize its competitor's costs in shifting its own circuits from one facility to another. NYNEX Reply at 7 n.11.

[20] Comments of MFS Communications Co., Inc. in Response to Teleport's Petition for Declaratory Ruling or Waiver (Dec. 7, 1992) at 3-5.

[21] *Id.* at 5-9.

[22] *Id.* at 6, 9-10.

[23] Southwestern Bell Telephone Company's Opposition to Teleport Communications Group's Emergency Petition for Declaratory Ruling, or, Alternatively, Petition for Waiver (Dec. 7, 1992) at 1-2.

[24] *Id.* at 2-3.

[25] 47 C.F.R. § 64.1402(c).

[26] *Expanded Interconnection Order*, 7 FCC Rcd at 7420, ¶ 108. *See also Expanded Interconnection with Local Telephone Company Facilities*, Second Notice of Proposed Rulemaking, 7 FCC Rcd 7740 (1992).

interconnection for special access, without unintentionally also introducing, as a matter of fact, collocated interconnection for switched transport.[27] We were also concerned that interconnector ratcheting in advance of the implementation of the new transport rate structure would unfairly allow interconnectors to compete by offering distance-sensitive, flat-rated switched transport service while the LECs must charge for the distance-sensitive element of switched transport on a per-minute basis.[28] Thus, our rationale focused on the effects on switched transport competition of connecting switched circuits to special access expanded interconnection facilities, rather than on concern about reduced prices for special access obtained when portions of special access facilities are used for switched traffic, which we would have done if we had intended the interpretation suggested by Teleport and MFS. These policy considerations are consistent with the language of the rule and support the interpretation that we intended to prohibit the use of collocated space associated with interstate special access expanded interconnection as a point of presence for switched access services, even if the interconnector were to pay the zero mileage charge.[29]

B. Petition for Waiver

11. In general, to qualify for a waiver, a party must demonstrate that application of a generally applicable rule would not be in the public interest in the special circumstances under consideration.[30] In the *Expanded Interconnection Order*, as explained above, we adopted a general rule prohibiting the interconnection of LEC switched services to interstate special access expanded interconnection facilities, in order to preserve the *status quo* regarding switched services until we finished addressing issues raised by the competitive provision of switched transport. We find, however, that Teleport has demonstrated that, in the limited circumstances involved in this waiver petition, a waiver of the ratcheting prohibition is warranted to avoid disrupting certain arrangements established prior to September 17, 1992, the date on which the *Order* was adopted. Before that date, Teleport made contractual commitments to meet the access needs of its customers, such as the IXC referred to in the Teleport Petition, that require the use of NYNEX switched circuits connected to Teleport's collocated facilities. Teleport and its customers entered into these contracts and invested substantial resources in the expectation that Teleport would be able to order switched circuits to its facilities collocated in NYNEX central offices under NYNEX's interpretation of its own tariffs, which permitted such interconnections. Applying the ratcheting provisions to arrangements that either existed prior to the adoption of the policy, or that are necessary to fulfill a contractual obligation to a customer entered into before the adoption of the policy, would disrupt pre-existing undertakings.[31] These arrangements were made in reliance on NYNEX's interpretation of its own tariffs. We believe that under these particular circumstances, a limited waiver of Section 64.1402(c), as described below, is in the public interest.

12. MFS has questioned the equity of giving a single interconnector a waiver when other interconnectors may have similar arrangements. While MFS would prefer a broader ruling, it did support parity among interconnectors in any action we might take. In response to these concerns, we are, on our own motion, granting a waiver of Section 64.1402(c) to permit other interconnectors to connect their special access expanded interconnection facilities to NYNEX interstate switched services to the extent they meet the conditions set forth below. This will ensure that any interconnector in the NYNEX operating area that had undertaken contractual commitments with customers before September 17, 1992 in reliance on NYNEX's tariff interpretation will not have its operations disrupted. This waiver is, of course, subject to any future Commission determinations in CC Docket No. 91-141 or CC Docket No. 91-213 regarding the implementation of long-term switched transport policies.

13. Accordingly, we grant a waiver of Section 64.1402(c) to Teleport and any other interconnector for their operations in the NYNEX service area under the following circumstances. Specifically, interconnectors may use interstate special access expanded interconnection offerings to connect their transmission facilities with NYNEX interstate switched circuits to the extent that: (1) the interconnector had placed written orders for such switched connections before the date the *Order* was adopted, or (2) the interconnector needs such connections in order to fulfill the requirements of contracts with its customers entered into in reliance on existing NYNEX offerings before the date the *Order* was adopted.

14. We deny Teleport's request for a broader waiver, however, to the extent that such a waiver would allow it to use interstate switched circuits, other than those specified in the previous paragraph, in collocated Teleport facilities subject to collocation facility agreements between NYT and Teleport entered into before the adoption of the *Order*.[32] Granting such a request would be tantamount to granting the relief requested in the declaratory ruling petition for a single interconnector, since it would permit connections to a potentially unlimited set of switched

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[27] *See MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 377 (D.C. Cir. 1977) (FCC may not restrict services that may be offered over a communications line, once authorized, unless it determines that such a restriction is in the public interest), *cert. denied*, 434 U.S. 1040 (1978).

[28] *Expanded Interconnection Order*, 7 FCC Rcd at 7420-21, ¶ ¶ 108-09.

[29] The prohibition applies both to collocated facilities used in connection with interim interstate expanded interconnection offerings and to collocated facilities used in connection with permanent interstate expanded interconnection offerings. The prohibition, however, does not apply to facilities collocated pursuant to state expanded interconnection policies or pursuant to private contracts, as long as the collocated facilities -- including the space in which they are located -- are not used for interstate special access expanded interconnection.

[30] *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); 47 C.F.R. § 1.3.

[31] The date of adoption is a reasonable cut-off date for purposes of this waiver. Teleport has followed this proceeding carefully, and we believe that after the date of adoption of the *Order*, Teleport was on notice that interconnectors would not be permitted to interconnect with switched traffic using their special access expanded interconnection facilities.

[32] We decline to address the issue of non-recurring charges applicable to switched circuits at this time.

circuits. We conclude that Teleport has not shown that unique circumstances exist that would warrant the grant of such a broad waiver.[33]

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that Teleport's Emergency Petition for Declaratory Ruling, or Alternatively, Petition for Waiver IS GRANTED to the extent specified herein, and otherwise IS DENIED.

16. IT IS FURTHER ORDERED that Section 64.1402(c) of the Commission's rules, 47 C.F.R. § 64.1402(c), is waived to the extent specified herein.

17. IT IS FURTHER ORDERED that the waiver adopted herein SHALL BE EFFECTIVE upon the date of release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[33] We are unconvinced by Teleport's characterization of its waiver request as enabling NYNEX to carry out its contractual commitments to Teleport. Teleport Petition at 4-5. Teleport has not refuted NYNEX's assertion that the contract under which Teleport is collocated explicitly provides that Teleport's use of the collocated space is subject to rules and regulations of government agencies with appropriate jurisdiction, and is "subject to change, modification, or cancellation as may be required by a regulatory authority . . . in the exercise of its lawful jurisdiction." NYNEX Opposition at 5-6; NYNEX Letter at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Lincoln Dellar — File Nos. BR-900730YR
BRH-900730C3

For Renewal of the Licenses of
Stations KPRL(AM) and KDDB(FM)
Paso Robles, California

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 1993; Released: April 6. 1993

By the Chief, Audio Services Division:

1. This proceeding involves the applications of the late Lincoln Dellar[1] to renew the licenses of stations KPRL(AM) and KDDB(FM), Paso Robles, California. Donald Pummill (who is also known as Don Davis) asks the Commission to deny both applications.[2] Pummill, a resident of the stations' community of license, was a minority partner of the stations' former licensee, Dellar/Davis Broadcasting Company. He argues that the stations' general compliance efforts declined after dissolution of the Dellar/Davis partnership in late 1989. According to Pummill, there were resulting FCC rule violations and non-FCC misconduct which raise serious questions about the licensee's continued ability to serve the public interest. The licensee filed an Opposition, to which Pummill filed a Reply. Pummill also submitted an amendment raising additional issues.

BACKGROUND

2. In assessing the merits of an objection to a license renewal application, the Commission first determines whether the objector makes specific allegations of fact which, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest. If so, then the Commission proceeds to examine and weigh all of the material before it, including the renewal applicant's submissions, to determine whether there is a substantial and material question of fact requiring resolution in a hearing. Finally, the Commission must determine whether grant or denial of the application would serve the overall public interest. *See generally*, 47 U.S.C., Sections 309(d)(1) and (2), as explained in *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). We have examined Pummill's allegations under these standards and, for the reasons set forth below, conclude that he does not present a *prima facie* case that grant of the KPRL/KDDB renewal applications would be contrary to the public interest or otherwise raise substantial and material questions of fact. For the purpose of our discussion, we have grouped Pummill's numerous allegations into three broad categories: (1) Compliance with Commission Rules; (2) Employment Practices; and (3) Non-FCC Misconduct.

DISCUSSION

Compliance With Commission Rules

3. Pummill charges that the licensee violated numerous FCC rules. Specifically, he alleges that the stations: do not properly maintain their public inspection files, overcharge political advertisers, air pre-recorded material as if it were live, engage in "plugola," have ineffective emergency broadcast systems, disregard several of the Commission's engineering rules, air indecent language, and conduct fraudulent contests. Upon our review of these matters we conclude that the licensee apparently did violate several of our rules, but that the apparent violations were of a much more limited scope than those alleged. For the reasons discussed below, we determine that the apparent violations are not of such magnitude as to raise any question substantial and material to our licensing decision, but that an admonishment of the licensee would be appropriate.

4. *Public Inspection File.* Pummill's first allegation concerns the public inspection files of stations KPRL and KDDB. Our rules require broadcast licensees to maintain a public file containing specific types of information related to station operations. 47 C.F.R. Section 73.3526(a). The purpose of this requirement is to provide the public with timely information at regular intervals throughout the license period. The public file generally must be maintained within the station's community of license even if the station's main studio is located outside of that community. 47 C.F.R. Section 73.3526(d). The file must be available to the public at any time during regular business hours. *Id.*

5. On October 15, 1990, Pummill visited the KPRL main studio in Paso Robles (which is the community of license for both KPRL and KDDB). He was shown KPRL's public file but told that the file for KDDB was located at the KDDB main studio in San Luis Obispo, approximately 30 miles from the community of license. Later that day, Pummill visited KDDB's San Luis Obispo studio and viewed a public file at that location.

6. Pummill alleges that the KDDB file was improperly located outside the community of license and that the contents of both the KPRL and KDDB files were in-

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[1] Lincoln Dellar, the stations' licensee at the time of filing, has since died. In 1992 the Commission approved an involuntary assignment of the stations' licenses to Sylvia Dellar, the executrix of his estate.

[2] Although Pummill's filing is captioned as a petition to deny, it does not meet the requirements for such a filing. In particular, it was not received by the cut-off date for filing petitions to deny and is accompanied by unsworn statements which do not meet our requirement that petitions be supported by affidavits. *See* 47 C.F.R. Section 73.3584. Accordingly, we will treat Pummill's filing as an informal objection pursuant to 47 C.F.R. Section 73.3587. An informal objection is not subject to many of the requirements of a formal petition to deny, but still must contain specific factual allegations sufficient to warrant the relief requested. *Area Christian Television, Inc.*, 60 RR 2d 862, 864 (1986); *Canton 67, Ltd.*, 7 FCC Rcd 736, 738 (1992) *citing Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

complete. The KPRL file allegedly did not contain Quarterly Issues/Programs lists for the second and third quarter of 1990 or sufficient information on broadcasts by candidates for public office. The KDDB file in San Luis Obispo allegedly contained only a few of the many items required. In addition, the KPRL staff in Paso Robles allegedly asked Pummill to leave before he had finished his review of the file.

7. The matters alleged would not be of such significance as to warrant non-renewal of the stations' licenses.[3] With respect to the alleged location of KDDB's file outside the community of license, the record reveals that stations KPRL and KDDB were co-located in Paso Robles until April 1989, at which time KDDB moved its studio to San Luis Obispo. The licensee kept a combined KPRL/KDDB public file in Paso Robles both before and after KDDB's move. However, when KDDB received correspondence in San Luis Obispo, the staff mistakenly maintained the documents there rather than forwarding them to Paso Robles.[4] The licensee states that Pummill's objection brought this matter to its attention and that it immediately relocated the San Luis Obispo documents to the existing Paso Robles file.

8. As there was in fact a public file for KDDB in Paso Robles, we conclude that the licensee did not violate our requirement that the KDDB file be located in the community of license. However, because the files for KPRL and KDDB were missing documents, such as two Issues/Programs lists and the materials retained in San Luis Obispo, we admonish the licensee to maintain complete public inspection files and to be certain that the public has access to them during regular business hours.[5]

9. *Political Advertising.* Pummill also alleges that the licensee violated several Commission rules concerning political advertising. Our rules prohibit stations from discriminating between legally qualified candidates for public office and require stations to bill such advertisers at a "lowest unit charge" equivalent to the rate given to the station's best customers. 47 C.F.R. Sections 73.1941(e) and 73.1942. The rules also require political advertisements to identify the ad's sponsor. 47 C.F.R. Section 73.1212(d). From his review of the public file, Pummill concludes that KPRL charged different and higher-than-permitted rates to candidates seeking the same public office. Pummill also alleges that one political commercial did not contain the required sponsor identification.

10. Assuming *arguendo* that the facts alleged are true, they would not justify non-renewal of KPRL's license. With respect to the sponsor identification problem, Pummill alleges only a single instance in which a sponsor identification was omitted. The licensee confirms that it inadvertently aired one political commercial which omitted sponsor information, but states that it caught and corrected this error almost immediately. As to alleged overcharges of candidates, the station overcharged one candidate but issued a refund. We note that an allegation that different, even higher, rates charged to candidates for the same office does not constitute a violation without more information, such as classes of time purchased, which Pummill did not provide. Furthermore, our review of the contracts provided show that in a number of instances the day parts and length of the advertisements were different, and thus the time periods may have been of a different character for rate purposes. We find that this matter does not raise any substantial and material question of fact requiring a hearing on the renewal application.

11. *Plugola.* Next, we consider Pummill's allegation that the licensee engaged in a prohibited practice known as "plugola." "Plugola" exists when a station employee responsible for including promotional material in a broadcast has an undisclosed financial interest in the goods or services being promoted. *See Report and Order,* Docket No. 14119, Announcement of Financial Interests of Broadcast Stations, 76 FCC 2d 221 (1980). To avoid plugola, stations must air appropriate sponsor identification announcements. *See* 47 C.F.R. Section 73.1212.

12. Pummill states that stations KDDB and KPRL engaged in plugola by airing a significant number of free advertising spots for the Stallings Ranch, a horseshoeing business owned by the licensee's granddaughter. Pummill alleges that the licensee has a financial interest in this business. The allegations, if true, would not constitute plugola because the alleged financial interests were of the licensee rather than of a station employee. The Commission does not require licensees to disclose their own financial interests in outside businesses promoted on the station. *See Policy Statement and Order, Elimination of Unnecessary Broadcast Regulation,* 57 RR 2d 913, 920-21 (1985), *aff'd sub nom., Telecommunications Research Action Center v. FCC,* 800 F.2d 1181 (D.C. Cir. 1986). Further, the licensee denies having any financial interest

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[3] *Cf. Catoctin Broadcasting Corp. of New York,* 2 FCC Rcd 2126, 2137 (Rev. Bd. 1987), *aff'd* 4 FCC Rcd 2553, *recon. denied* 4 FCC Rcd 6312 (1989) (severe sanction of non-renewal generally inappropriate for public file violations). Pummill, while alleging missing and/or incomplete Issues/Programs lists in the public file, does not allege that the stations' issue-responsive programs (which should be recorded on such lists) failed to meet the licensee's obligation to address the needs and problems of Paso Robles.

[4] In addition, the staff at KPRL's studio in Paso Robles was apparently not familiar enough with the public file's contents to know that it contained documents for both its own station and for sister station KDDB.

[5] We note that the licensee's response to Question 7 of the license renewal application indicates that it had placed required documents in its public inspection file at appropriate times. The record before us indicates otherwise. However, this does not appear to involve any misrepresentation. At the time of the licensee's filing of its application, it appears to have been unaware that additional KDDB documents were in San Luis Obispo. As to the other missing/late filed documents, the record indicates that the staff responsible for the public file were not completely familiar with our public file requirements and may have provided the licensee with incorrect information. We are concerned that the licensee, who is responsible for the actions of its employees, did not adequately ensure the accuracy of information provided to the Commission and, therefore, we caution the licensee that it must verify such information more carefully in the future. Nevertheless, we find that the licensee was forthright with the Commission upon being made aware of its error through the informal objection and nothing in the record before us indicates any willful intent of the licensee to deceive the Commission. Accordingly, the licensee's incorrect answer to Question 7 does not raise any substantial and material question as to the licensee's ability to deal truthfully with the Commission. *See Arkansas Educational Television Commission (KETS TV),* 6 FCC Rcd 478 (1991).

in his granddaughter's business. We find that the matters alleged do not raise any plugola problems or have any license renewal implications.

13. *Misleading Broadcasts.* Pummill also charges that KPRL misleads the public as to the timing and broadcast location of its traffic reports. The station allegedly states that its traffic van, the "Road Ranger," rides each hour with live traffic reports. However, according to Pummill, the traffic reports are at times pre-recorded in the KPRL studios, recorded over the phone, aired from the announcer's home, or aired "live" from KPRL's parking lot.

14. The Commission's rules require that stations announce as recorded any taped material in which time is of special significance, or by which an affirmative attempt is made to create the impression that it is occurring simultaneously with the broadcast. 47 C.F.R. Section 73.1208. It appears that the station may have aired recorded Road Ranger reports during the first two weeks of the promotion in violation of 47 C.F.R. Section 73.1208. For that two-week period station employees allege, and the general manager confirms, that the reporter in charge of the Road Ranger phoned reports in from his home so he would not have to get up early. The general manager acknowledges that some of these reports may have been prerecorded and states that he fired the reporter upon learning of this situation. The described situation, which was limited to a two-week period, would not be serious enough to warrant non-renewal, but we admonish the licensee for this violation.

15. Other than during the two-week period described above, there is no issue of whether the Road Ranger reports were live. Rather, the allegations relate to whether the reports were made from the van and whether the van was out on the road. While these allegations of misleading live programming would not rise to the level of a broadcast hoax or news distortion, to the extent that the allegations are true we would caution the licensee not to engage in practices that could mislead its listeners in the future. *See generally* 47 C.F.R. Section 73.1217; *Hunger in America*, 20 FCC 2d 143, 151 (1969). The matters alleged do not, however, warrant designation of KPRL's license renewal application for hearing.

16. *Engineering Matters.* Next, we consider Pummill's allegations of engineering violations. Several of our technical rules are relevant to this discussion. First, we require stations to have a licensed operator on duty during all periods of broadcast operation. This can be accomplished by means of an operator present at a remote control point. 47 C.F.R. Section 73.1860. Second, stations must operate within established modulation levels. Carrier modulation and stereo pilot modulation for FM stations may not exceed 110% and 10% respectively. 47 C.F.R. Sections 73.1570(b)(2)(ii) and 73.322(a)(2). Finally, AM stations are required to make periodic equipment performance measurements unless they complied with certain "NRSC-1" requirements by June 30, 1990. 47 C.F.R. Section 73.44(e).

17. Pummill alleges the following violations: (1) that KDDB's remote control system was not working for 5 months in 1990, resulting in unmanned evening, weekend, and holiday operation of the station; (2) that KDDB's carrier modulation was measured at 118% and its stereo pilot modulation at 14%, indicating overmodulation; and (3) that KPRL did not install a NRSC-1 transmitter filter by the required date. However, Pummill does not submit sufficient facts to support these allegations and, therefore, does not make a *prima facie* case. Further, the records of our Los Angeles field office revealed no other technical complaints against these stations.

18. Pummill's charge of unmanned operation is based on a short unsworn statement by a Tom Hughes, an engineering acquaintance of Pummill. Hughes does not state the basis for his knowledge of the matters alleged. Further, it appears that Pummill's conclusions are incorrect. The licensee submits a supplementary statement from Hughes and an affidavit from William Bordeaux (contract technician for KDDB's remote control center). These submissions show that Pummill's allegations were based on erroneous assumptions as to why the station's screen at the remote control center was dark on two occasions.[6]

19. With respect to KDDB's alleged overmodulation, we question the reliability of the submitted measurements, which were taken by an unnamed engineer using unspecified methods. Even assuming the validity of the data, however, these one-time measurements suggest relatively small deviations from established standards and would not be indicative of any continuing technical problem.

20. Pummill's allegation that KPRL did not install an NRSC-1 AM transmitter filter by the required date would not indicate any rule violation, just a need for the station to take additional measurements. Further, we find a sworn statement of KPRL's contract technician (who says he installed the filter by the June 30, 1990 benchmark) more persuasive than Pummill's unsworn statement on this matter.

21. *Emergency Broadcast System.* According to Pummill, there are violations at both stations related to the Emergency Broadcast System (EBS). Stations electing to participate in the EBS must follow a number of rules designed to ensure effective dissemination of emergency information. EBS participants must be capable of receiving and transmitting EBS signals at all times during their station's operation. 47 C.F.R. Section 73.932. Upon receipt of an EBS alert, station personnel must follow the procedures described on an EBS checklist. Checklists must be posted at normal duty positions where they are immediately available to the staff responsible for EBS action. 47 C.F.R. Sections 73.933(a), 73.936(a), and 73.937(a). Among the required procedures, the station must monitor emergency programming on another broadcast station specified in their state's EBS Plan. 47 C.F.R. Section 73.932(a). Tests of the EBS procedures are conducted at regular intervals. 47 C.F.R. Section 73.961.

22. Pummill alleges that stations KDDB and KPRL participate in the EBS but do not follow the above-mentioned requirements. According to Pummill, KDDB's EBS equipment is not connected to the station's remote control unit, resulting in no EBS receive/transmit capabil-

[6] The Bordeaux affidavit acknowledges that the remote control was not working on one other occasion, October 15, 1990, due to the power plug becoming disconnected. However, this one-day remote control problem would not warrant non-renewal.

ity during evening, weekend, and holiday hours when the station is in operation. As to sister station KPRL, Pummill alleges that the station's EBS checklist is kept inside a locked closet inaccessible to station staff, that the station is unable to monitor the ABC and CBS networks, and that the station did not receive an April 1990 EBS test from the County Office of Emergency Preparedness.

23. We have examined Pummill's EBS allegations carefully, but do not find any substantial and material question of fact or evidence of any violation. The allegations against station KDDB are based on the statement of Tom Hughes. That statement is not represented to be based on Hughes' personal knowledge. From the overall record of the case, however, it appears that Mr. Hughes may have based his EBS conclusions on an incorrect assumption regarding the meaning of blank screens at KDDB's remote control center (*see* para. 18 *supra*). The licensee rebuts that assumption with an affidavit from an engineer familiar with KDDB's remote control center, who states that the remote control system for the station's operations is separate and unrelated to the control center's mechanism for receiving the station's EBS alerts.

24. With respect to KPRL's EBS system, the licensee submits photos showing that the station's EBS checklists are posted in a readily accessible area of the KPRL studio. There apparently was an additional checklist posted in a storage closet but that list seems superfluous, remaining from a time when the station also received EBS information via a wire service teletype machine previously kept in that closet. As to KPRL's over-the-air monitoring, Pummill states that KPRL fails to monitor both the ABC and the CBS networks. However, our rules do not require EBS participants to monitor more than one station. Our review of the EBS Plan for California reveals that KPRL is given a choice to monitor either station KVEC or KGLW, both affiliates of the ABC network. Accordingly, we accept the licensee's statement that it has the ability to monitor both the ABC and CBS networks but, in practice, only monitors ABC. Finally, an alleged failure of KPRL to receive an April 1990 EBS test is not based on Pummill's personal knowledge and he submits no written statement from any person with such knowledge. In sum, we find the EBS allegations in this proceeding insufficient to warrant further consideration in either the licensing or the enforcement context.

25. *Indecency.* Next, we consider Pummill's allegations of indecency. The U.S. Supreme Court has recognized that indecent speech, while protected by the First Amendment, may in the context of broadcasting be subject to government-imposed time, place, and manner restrictions due to the unique pervasiveness of the broadcast medium. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The broadcast of indecent material is prohibited by 18 U.S.C. section 1464. The Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of this prohibition. *See* 47 U.S.C. Sections 312(a)(6) and 503(b)(1)(D). Broadcast material is "indecent" if it "describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In analyzing whether particular material meets this definition, the Commission looks first and foremost to the context in which the language was presented. *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930, 932 (1987), *aff'd in relevant part sub. nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). During the relevant time period, broadcast of indecent material was actionable if it occurred between the hours of 6 a.m. and 8 p.m. (when there would be a reasonable risk that children may be in the audience). *See, e.g., Kansas City Television, Ltd. (KZKC-TV)*, 4 FCC Rcd 6706 (1989).

26. Pummill does not make a *prima facie* case of actionable broadcast indecency. Much of the material to which Pummill objects was not broadcast over the air but rather used to promote KDDB on billboards or in publications. The Commission does not regulate such non-broadcast material. The material allegedly broadcast on air were several slogans that included the word "butt" and the one-time statement "Ooops, fucked that one up" by a news announcer who made a mistake in his report. As Pummill does not state the time of day when any of this material aired, we cannot determine whether any of this material aired during times within the Commission's enforcement authority. In any event, given the contextual and other information provided concerning the broadcast of this material, there does not appear to be a basis for further Commission action. The word "butt" in the slogans "Nothing Butt Music" and "No Butts About It" does not suggest a patently offensive description of sexual or excretory functions or organs. As to the news announcer's use of a single expletive, the matter would not appear to warrant further Commission consideration in light of the isolated and accidental nature of the broadcast. We also note that the licensee reprimanded the announcer involved and took steps to prevent any similar occurrences.

27. *Contests.* In a supplement to his objection, Pummill brings to the Commission's attention several licensee-conducted contests that he believes violate our rules.[7] Under those rules, a licensee that broadcasts information about a contest it conducts must fully and accurately disclose the material terms of the contest, and must conduct the contest substantially as announced. 47 C.F.R. Section 73.1216. The purpose of these requirements is to prevent contests that are false, misleading, or deceptive. *See Report and Order, Rules Relating to Licensee-Conducted Contests*, Docket No. 20500, 60 FCC 2d 1072 (1976).

28. Pummill alleges that KDDB's "Compute the Loot" contest was not conducted substantially as announced. He states that the licensee aired teasers for this contest telling listeners that prizes worth thousands of dollars would be awarded. The licensee allegedly cancelled the contest before its scheduled start date but conducted the contest one month later. When an announced contest is cancelled it is not conducted "substantially as announced," and therefore, assuming the allegations to be true, there may technically have been a violation of our rules. The facts alleged do not, however, indicate any deception of the public. It is unclear whether the teasers announced a firm

[7] Many of the matters raised, however, do not fall within the scope of any Commission rule or policy. We do not, for example, regulate whether contest participation can be limited to U.S. citizens or whether contest requirements can be difficult. Several additional contest allegations concerning the station's alleged conduction of lotteries are based on a misunderstanding of our rule on the broadcast of lottery information. *See* 47 C.F.R. Section 73.1211.

start date, the contest was actually conducted (albeit one month late), and Pummill has not shown the value of the prizes awarded to be less than those announced. Accordingly, we do not find cancellation of the "Compute the Loot" contest deserving of further consideration.

29. Pummill also alleges that KPRL's "The Hidden House" contest was fraudulent because it gave listeners a false impression that they could still win for several weeks after a winning entry had been received. Pummill submits contest rules stating that the contest would begin on January 16, that the winner would be announced on February 20, and that the earliest postmarked entry sent to the correct "hidden house" would win. As Pummill interprets these rules, the contest should have ended upon receipt of the first correct entry. The rules clearly do not require such early termination of the contest, however. They require announcement of the winner on February 20th, which the station apparently did. Accordingly, the facts alleged do not show "The Hidden House" contest to be other than announced. Further, given the relatively short duration of this contest, we do not find these rules to be unreasonable or misleading.

Employment Practices

30. Pummill makes six allegations regarding the licensee's Equal Employment Opportunity (EEO) record. First, he alleges that 19 women left the stations from 1989 to 1990 through termination or resignation and that "some have alleged sexual harrassment [sic]." Next, he alleges that the general manager of KPRL told a female employee of KDDB during a business discussion that she had "beautiful... eyes." Third, he alleges that three female employees of KPRL complained of sexual harassment. Fourth, Pummill alleges that KDDB told the Commission that it promoted a Black woman when, in fact, she was White. Fifth, KDDB terminated its general sales manager, a woman, because, it claims, it did not need a sales manager, a statement that is not credible based on the staffing of other stations in the area, according to Pummill.[8] Finally, he alleges that KPRL failed to comply with its EEO program because it ran a newspaper ad for two days that failed to identify itself as an equal opportunity employer.

31. Pummill's allegations are not sufficient to raise a *prima facie* case that the renewal applications of KPRL/KDDB must not be granted on EEO grounds. *See Astroline Communications Co. v. FCC, supra.* The two allegations of sexual harassment are general, involve unidentified persons, and do not state whether or not formal complaints were filed with appropriate agencies. It apparently is true that the stations initially misclassified a White female as Black. This was an error which the licensee corrected with the Commission. Complimenting an employee, eliminating a position, and failing to include the equal opportunity employer statement in a newspaper ad, without more, constitute no basis for denying a renewal.

Non-FCC Misconduct

32. Pummill also alleges that the licensee engaged in non-FCC misconduct as a result of fraudulent billing practices. For example, he alleges that the stations did not run advertisements as promised, engaged in network clipping, and preempted baseball games it was allegedly paid to carry. The Commission eliminated its rules covering such matters several years ago. *See generally Second Report and Order, Elimination of Unnecessary Broadcast Regulation,* MM Docket No. 83-842, 59 R.R. 2d 1500 (1986), *recon. denied,* 2 FCC Rcd 3474 (1987). Parties wronged by a station's billing practices have adequate remedies elsewhere. Accordingly, we do not regulate these matters in the first instance. Of course, to the extent that these matters have been adjudicated by an appropriate court or agency, we will consider whether the adjudicated findings reflect on the licensee's character qualifications. *Id.,* 59 R.R. 2d at 1510.[9] However, as Pummill's allegations are not adjudicated, it would not be appropriate to consider them further at this time.

CONCLUSION/ORDERING CLAUSES

33. In sum, we find that the objection before us indicates several apparent rule violations warranting an admonishment of the licensee but does not raise any substantial and material question of fact requiring designation of either station's renewal application for hearing.

34. Accordingly IT IS ORDERED that the objection of Donald Pummill IS DENIED.

35. As the record does, however, reflect a certain inattention by the licensee to several Commission rules, we caution the licensee that it must pay close attention to our rules in the future operation of the stations.

36. As the stations are currently licensed to the executrix of Mr. Dellar's estate, and we do not generally grant license renewals to such interim licensees, we SHALL DEFER final action on the renewal applications for stations KPRL(AM) and KDDB(FM) until such time as the executrix files an application to assign the stations' licenses to a permanent party.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads
Chief, Audio Service Division
Mass Media Bureau

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[8] Accompanying Pummill's first, second, third, and fifth allegations was a one-sentence statement from a woman stating: "I have read paragraph #[ ] and found it to be true to the best of my knowledge." However, the signatories are unidentified and the statements are neither sworn nor made under penalty of perjury.

[9] *See Report, Order, and Policy Statement, Policy Regarding Character Qualifications In Broadcast Licensing,* Gen. Docket No. 81-500, 102 FCC 2d 1179, 1204-05 (1986), *recon. granted in part and denied in part,* 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC,* No. 86-1179 (D.C. Cir. June 11, 1987), *modified* 5 FCC Rcd 3252 (1990), *recon. in part,* 6 FCC Rcd 3448 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED — File No. I-T-C-92-150

Application for authority under Section 214 of the Communications Act of 1934, as amended, to establish international packet switching service between Guam on the one hand and various geographic points on the other hand.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: March 31, 1993; Released: April 14, 1993

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned application filed by GTE Hawaiian Telephone Company Incorporated (GTE/HTC) requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish international packet switching service (IPSS)[1] on a blanket basis between Guam on the one hand and various geographic points on the other hand.[2] The application was placed on the Commission's public notice. IT&E Overseas, Inc. (IT&E) filed a petition to deny the application and GTE/HTC filed an opposition to which IT&E replied.

2. In its application, GTE/HTC states that no new facilities are required to provide IPSS as proposed. According to GTE/HTC, an intelligent packet assembler/disassembler will be located in Guam, and all IPSS traffic will transit the GTE/HTC packet switch in Honolulu, Hawaii. GTE/HTC currently has 28 international message toll service (IMTS) telephone circuits between Hawaii and Guam. GTE/HTC also notes that it has previously been granted authority to provide IPSS between Hawaii and the geographic locations it now proposes to serve from Guam.[3]

3. IT&E petitioned to deny the application because it believes the proposed service would violate the GTE Consent Decree[4] since the GTE Corporation and its subsidiaries were expressly prohibited from providing interexchange service except international services being offered at the time of the decree. IT&E also accuses GTE/HTC of misrepresenting the nature of its circuits serving Guam since it believes that GTE/HTC does not offer direct service either to or from Guam. IT&E believes that any circuits GTE/HTC uses to provide service with Guam are circuits shared with its correspondent for the termination of *domestic* MTS traffic from Hawaii to Guam pursuant to a carrier-to-carrier agreement.

4. In response to IT&E's charges, GTE/HTC states that issues involving the GTE Consent Decree are properly raised before the District Court or the Department of Justice and not the Commission. GTE/HTC denies that the proposed service violates the terms of the GTE Consent Decree since Section V(C)(1) specifically permits it, and inherently its subsidiary, MTC, to provide international services. GTE/HTC also denies any misrepresentation in its application since it provides direct IMTS service, private line service and direct IPSS between Hawaii and Guam. GTE/HTC proposes to use a 9.6 Kbps private line circuit on the TPC-2 cable to provide direct IPSS between Hawaii and Guam, while IPSS between Guam and locations other than Hawaii will transit GTE/HTC's facilities in Honolulu.

5. After consideration of the application and the petition filed by IT&E, we conclude that authorization of the requested service will serve the public interest. No new services will be involved and GTE/HTC already has been authorized to provide service between Hawaii and the geographic locations it proposes to serve in the subject application.

6. We dismiss IT&E's petition to deny because of alleged violations of the GTE Consent Decree. In response to the same argument raised by IT&E in the context of other applications involving subsidiaries of GTE Corporation, the Commission has made it clear that the District Court and the Department of Justice, not this Commission, are charged with determining whether certain actions are in violation of the GTE Consent Decree.[5] IT&E acknowledges that the issues raised herein will be addressed in a formal investigation by the Department of Justice. Our authorization herein will be subject to any decision by the Department of Justice and the District Court with respect to the alleged violation of the GTE Consent Decree. The Commission will take appropriate steps, if necessary, once a decision is rendered on this issue.

7. Accordingly, IT IS ORDERED that application File No. I-T-C-92-150 IS GRANTED and GTE/HTC is authorized to use previously authorized facilities to provide IPSS between Guam and Hawaii on a direct basis and between Guam and the geographic locations listed in Attachment 1 via its own packet switch in Honolulu, Hawaii.

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[1] IPSS is an internetworking service furnished for the switching and transmission of data packets at transmission speeds up to 9.6 kbps between GTE/HTC's intelligent packet assembler/disassembler in Guam, the packet switch in Hawaii, and overseas locations.

[2] GTE/HTC requests authority to provide IPSS between Guam and American Samoa, Australia, Federated States of Micronesia, Hong Kong, Indonesia, Japan, Korea, the Marshall Islands, New Zealand, the Philippines, Singapore, Taiwan and Thailand.

[3] *See* GTE Hawaiian Telephone Company, 5 FCC Rcd 1770 (1990); GTE Hawaiian Telephone Company, et al., 5 FCC Rcd 5368 (1990); and GTE Hawaiian Telephone Company, 6 FCC Rcd 5755 (1990).

[4] United States v. GTE Corporation, Civ. Action No. 83-1298, Trade Cas. (CCH) 66.355 (D.D.C. 1985) ("GTE Consent Decree").

[5] Micronesian Telecommunications Corporation, 8 FCC Rcd 750 (1993).

8. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of their execution.

9. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

10. IT IS FURTHER ORDERED that the applicant shall file the annual report of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

11. IT IS FURTHER ORDERED that IT&E's petition to deny the application IS DISMISSED.

12. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT 1

American Samoa
Australia
Federated States of Micronesia
Hong Kong
Indonesia
Japan
Korea
Marshall Islands
New Zealand
Philippines
Singapore
Taiwan
Thailand

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company	File No. W-P-C-6670
US West Communications	File No. W-P-D-364
Bell Atlantic Telephone Companies	(No File Number)
BellSouth Telephone Companies	(No File Number)

Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 1993; Released: March 29, 1993

By the Commission:

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APPENDIX A List of Section 214 Applications and Responsive Pleadings

APPENDIX B List of Information Submissions and Responsive Pleadings

I. INTRODUCTION

1. "Dark" fiber service is the provision and maintenance of fiber optic transmission capacity between customer premises where the electronics and other equipment necessary to power or "light" the fiber are provided by the customer, not the local exchange carrier (LEC).[1] In this Order, we review the Section 214 applications filed by four Bell Operating Companies (BOCs) -- the Bell Atlantic Telephone Companies (Bell Atlantic), the BellSouth Telephone Companies (BellSouth), Southwestern Bell Telephone Company (SWB), and US West Communications (US West) -- for discontinuance of their dark fiber service offerings. We conclude that dark fiber service is subject to our jurisdiction under Title II of the Communications Act because dark fiber service is "wire communication" offered by the BOCs on a common carrier basis. We also find that Section 214 authorization is required for termination of the BOCs' dark fiber service because such action would "discontinue, reduce, or impair service to a community." Finally, we conclude that the BOCs have not met their burden of proof because they have failed to show that the public convenience and necessity will not be adversely affected by discontinuance of their dark fiber service. Accordingly, we deny the Section 214 discontinuance applications filed by Bell Atlantic, BellSouth, SWB, and US West.

[1] *See* Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 4 FCC Rcd 8634, 8645 n.7 (1989) (*ICB Order*). The terms "dark" fiber service and "dry" fiber service are synonymous. For simplicity's sake, we will use only the term "dark" fiber herein. "Dim" fiber service is the provision of fiber optic transmission capacity between customer premises where the electronics are provided by the LEC at one end of the fiber and are provided by the customer at the other end of the fiber. "Lit" fiber service is the provision of fiber optic transmission service between customer premises where the electronics are provided by the LEC at both ends of the fiber.

II. BACKGROUND

2. From January to March, 1988, a number of BOCs and other LECs proposed revisions to their access tariffs to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings. On March 28, 1988, the Common Carrier Bureau (Bureau) released a *Designation Order* [2] which: (1) initiated an investigation of the LECs' proposed ICB rates for DS3 and DS3-equivalent services; and (2) designated for investigation issues concerning the LECs' continued use of ICB rates for such offerings. On October 17, 1988, the Bureau issued a *Supplemental Designation Order* [3] concerning the LECs' use of ICB rates for dark fiber service. On December 18, 1989, the Commission released the *ICB Order* [4] which: (1) found ICB rates for DS3 and DS3-equivalent services unreasonably discriminatory and therefore unlawful under Section 202(a) of the Communications Act; and (2) directed the LECs to remove most ICB rates for such services, with limited exceptions, from their tariffs and to file general rates for these services. The *ICB Order* also found that: (1) the provision of dark fiber service was very new and had limited applicability; and (2) the LECs appeared to lack sufficient experience to file averaged rates. Thus, the Commission permitted the LECs to continue to file ICB tariffs for dark fiber service until such time as they gained sufficient experience with costs and demand to file general tariff rates for dark fiber service offerings.

3. However, on reconsideration, the Commission found, on the basis of new evidence, that Bell Atlantic, BellSouth, SWB, and US West -- the four BOCs whose Section 214 discontinuance applications are before us -- did have sufficient experience in the provision of dark fiber service to develop averaged rates. Accordingly, on August 6, 1990, the Commission released the *Reconsideration Order*,[5] which directed these carriers to: (1) file tariff revisions establishing generally available, averaged rates for dark fiber service within 30 days; and (2) amend their dark fiber service ICB tariffs to terminate within one year.

4. All four BOCs filed petitions for waiver of the *Reconsideration Order* requirement that they file generally available, averaged rates for dark fiber service. In order to consider the waiver petitions, the Bureau twice extended the filing date for those tariffs to a final date of November 1, 1990.[6] On October 26, 1990, the Bureau released the *Waiver Order*,[7] which denied the BOCs' petitions for waiver of the tariff filing requirement in the *Reconsideration Order*.[8] On October 31, 1990, US West and SWB filed with the United States Court of Appeals for the District of Columbia Circuit emergency petitions for writs of prohibition or, in the alternative, a stay of the *Waiver Order*.[9] The Court denied these petitions on November 1, 1990.[10]

5. Thus, on November 1, 1990, Bell Atlantic, BellSouth, SWB, and US West filed general tariffs for dark fiber service. After reviewing the tariffs, the Bureau issued a *Suspension Order* [11] on February 22, 1991, which: (1) partially suspended the dark fiber service general rates filed by Bell Atlantic, BellSouth, SWB, and US West; (2) allowed the remaining portions of the charges to take effect; (3) suspended specific provisions of these BOCs' tariffed terms and conditions; and (4) initiated an investigation in CC Docket No. 88-136 of the rates, terms, and conditions in these BOCs' dark fiber service tariffs. All four BOCs filed applications for review of the actions taken in the *Suspension Order*. SWB also filed a petition for stay of the *Suspension Order* which the Bureau denied.[12]

6. On July 19, 1991, the Commission released two Orders in the dark fiber docket. In the *Suspension Review Order*[13] the Commission denied the applications for review of the Bureau's *Suspension Order*. In the *Prescription Order* [14] the Commission: (1) rejected as unlawful the dark fiber service rates under investigation in Docket

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[2] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 3 FCC Rcd 2582 (Com. Car. Bur. 1988) (*Designation Order*).

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 3 FCC Rcd 6066 (Com. Car. Bur. 1988) (*Supplemental Designation Order*).

[4] *ICB Order*, *supra*, note 1.

[5] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 5 FCC Rcd 4842 (1990) (*Reconsideration Order*), *petitions for further recon. pending, petitions for stay pending.*

[6] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 5 FCC Rcd 5420 (Com. Car. Bur. 1990) (*Extension Order*); Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 5 FCC Rcd 5919 (Com. Car. Bur. 1990) (*Second Extension Order*).

[7] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 5 FCC Rcd 6772 (Com. Car. Bur. 1990) (*Waiver Order*), *applications for review pending, petition for stay pending.*

[8] On September 5, 1990, SWB and US West filed petitions for further reconsideration of the *Reconsideration Order*. These petitions are pending.

[9] Just prior to this filing, on October 25, 1990, US West filed with the Commission a petition for stay of the *Reconsideration Order* provisions requiring the filing of a dark fiber tariff. On October 30, 1990, SWB filed with the Commission a petition for stay of the *Reconsideration Order* and the *Waiver Order*. The petitions for stay of both US West and SWB are pending.

[10] *In re Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company*, No. 90-1512, and *Southwestern Bell Telephone Company*, No. 90-1514 (D.C. Cir. Nov. 1, 1990).

[11] Bell Atlantic Telephone Companies, CC Docket No. 88-136, 6 FCC Rcd 1436 (*Suspension Order*), *as modified*, 6 FCC Rcd 1813 (Com. Car. Bur. 1991) (*Modification Order*).

[12] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 6 FCC Rcd 1821 (Com. Car. Bur. 1991).

[13] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 6 FCC Rcd 4776 (1991) (Commissioner Marshall dissenting and issuing a statement; Commissioner Duggan concurring) (*Suspension Review Order*), *petitions for review pending.*

[14] Bell Atlantic Telephone Companies, *et al.*, CC Docket No. 88-136, 6 FCC Rcd 4891 (1991) (Commissioner Marshall dissenting and issuing a statement) (*Prescription Order*), *petitions for review pending.*

88-136; (2) prescribed rates for dark fiber service;[15] (3) found unlawful and rejected the suspended tariff terms and conditions; and (4) terminated the investigation.[16]

7. Immediately after filing their dark fiber service tariffs on November 1, 1990 as required by the *Reconsideration Order*, Bell Atlantic, BellSouth, SWB, and US West filed Section 214 applications to discontinue provision of their dark fiber service.[17] EDS Corporation (EDS) and MCI Telecommunications Corporation (MCI) filed oppositions to all four BOCs' applications. Williams Telecommunications Group, Inc. (Williams) filed oppositions to all but US West's Section 214 discontinuance application. All four BOCs responded to these oppositions, and Williams filed a further response to all but US West's filings.[18] A number of *ex parte* presentations were also filed and are part of the public record.

8. On August 30, 1991, the Bureau released a *Public Notice* requesting the four BOCs to provide information on customer demand for their tariffed dark fiber service.[19] All four BOCs filed public and confidential information submissions. Comments on the public filings were filed by EDS, MCI, Williams, McDonnell Douglas Corporation (MDC), and Communications Transmission, Inc. (CTI). Reply Comments were filed by the International Communications Association (ICA), Bell Atlantic, BellSouth, SWB, and US West. A number of *ex parte* presentations were also filed and are part of the public record.[20]

III. DISCUSSION

9. Before evaluating the merits of the BOCs' applications, we address two threshold matters. First, we consider whether the BOCs' provision of dark fiber service falls within our jurisdiction over communications common carriage. We conclude that it does. Second, we consider whether the BOCs' are required to obtain Commission authority to discontinue dark fiber service, *i.e.*, whether such termination constitutes a discontinuance, reduction, or impairment of service to a community within the meaning of Section 214(a). We conclude that Section 214 does apply to these discontinuances. Finally, we reach the merits of the Section 214 issue and consider whether the proposed service terminations would adversely affect the present or future public convenience and necessity. We conclude that the BOCs have not met their burden of proof because they have failed to show that the public convenience and necessity will not be adversely affected by discontinuance of their dark fiber service. Accordingly, we deny the Section 214 discontinuance applications filed by Bell Atlantic, BellSouth, SWB, and US West.

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[15] The Commission ordered that the prescribed rates remain in effect until July 1, 1992, at which time they were to be incorporated into the carriers' respective Special Access baskets and could then be altered within the constraints of the price cap rules. *Prescription Order*, 6 FCC Rcd at 4895. SWB and Bell Atlantic filed rate increases which took effect July 1, 1992. *See* 1992 Annual Access Tariff Filings, CC Docket No. 92-141, 7 FCC Rcd 4734 (1992), ¶ 15.

[16] All four BOCs filed with the United States Court of Appeals for the District of Columbia Circuit petitions for review of both the *Suspension Review Order* and the *Prescription Order*. *See Southwestern Bell Telephone Company v. Federal Communications Commission*, No. 91-1416 and consolidated cases (D.C. Cir. filed Aug. 27, 1991). At the Commission's request, the Court, in October 1991, consolidated these petitions and commenced holding the proceedings in abeyance pending conclusion of the instant Section 214 proceeding. *See Southwestern Bell Telephone Company v. Federal Communications Commission*, No. 91-1416 and consolidated cases (D.C. Cir. Oct. 15, 1991). In March 1993, in response to a motion by SWB, the Court lifted its order holding in abeyance the consolidated challenges to these Commission orders. *See Southwestern Bell Telephone Company v. Federal Communications Commission*, No. 91-1416 and consolidated cases (D.C. Cir. Mar. 5, 1993).

[17] Bell Atlantic Telephone Companies, Application for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Facilities (filed Feb. 13, 1991, amended Feb. 27, 1991); BellSouth Telephone Companies, Application (Under Protest) for Authority Pursuant to Section 214 of the Communications Act of 1934 To Cease Providing Specialized Dry Fiber Arrangements (filed Mar. 1, 1991); Southwestern Bell Telephone Company, Application (Under Protest) for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Specialized Dark Fiber Arrangements, File No. W-P-C-6670 (filed Nov. 2, 1990); US West Communications, Contingent Application Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Specialized Dark Fiber Arrangements, File No. W-P-D-364 (filed Dec. 14, 1990). A list of the parties and the pleadings with respect to the BOCs' Section 214 applications is found in Appendix A.

[18] On January 19, 1991, SWB filed a motion for extension of time to reply to the petitions to deny and the oppositions to its Section 214 application. On February 5, 1991, SWB filed its late reply. On February 15, 1991, Williams filed a motion for extension of time to respond to SWB's reply. On February 22, 1991, Williams filed its late response to SWB's reply, accompanied by a motion for late acceptance. On May 30, 1991, Williams filed a late reply to BellSouth's opposition to the petitions to deny and the oppositions to its Section 214 application, accompanied by a motion for late acceptance. Since these movants have shown good cause for their late filings, and since their delay did not materially prejudice any party to this proceeding, we grant the motions and accept the pleadings.

[19] Public Notice, Section 214 Applications to Discontinue Providing Dark Fiber Facilities, 6 FCC Rcd 5238 (Com. Car. Bur. 1991) (*Public Notice*).

[20] A list of the parties and the pleadings filed with respect to the BOCs' Information Submissions is found in Appendix B. Not all comments are specifically mentioned in this Order; however, all comments have been considered and all material arguments are addressed.

A. Jurisdiction Over Dark Fiber Service

10. The commenting parties disagree as to whether dark fiber service is a communications service falling within our Title II jurisdiction. The BOCs allege that it is not.[21] Their opponents argue to the contrary. The Commission has not heretofore addressed the issue.[22]

11. In making a determination of our Title II authority over dark fiber service, it is "necessary first of all to set forth the scope of the mandate Congress entrusted to us."[23] Title I of the Act confers upon the Commission jurisdiction over "interstate and foreign *communication by wire* or radio ...."[24] Title I defines "wire communication" or "communication by wire" as:

> the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services ... incidental to such transmission.[25]

12. Title II grants the Commission authority over "common carriers" engaged in the provision of interstate or foreign communication services.[26] To determine whether an activity is subject to our Title II jurisdiction and the requirements of Title II, we must determine whether such activity constitutes "wire communication" within the meaning of 47 U.S.C. § 153(a) and is provided on a common carrier basis within the meaning of 47 U.S.C. § 153(h).[27]

1. Communication by Wire

13. SWB and US West contend that the provision of dark fiber service is not subject to our jurisdiction under Title II of the Act because dark fiber service does not constitute a "communications service" within the meaning of Section 153(a).[28] They contend that offering dark fiber service is engaging not in communications service but in the facility construction business.[29] US West asserts that dark fiber is not a "service *per se*"[30] but rather a mere physical facility (a glass cable that provides optical connectivity between two designated points), similar to a telephone pole, conduit, or piece of copper wire, which has no communications capacity until after a customer adds its own electronics.[31]

14. In opposition, Williams states that whether a particular carrier offering is a communications service subject to Title II regulation hinges on the Act's definitions of "wire communication" and "radio communication" in Sections 3(a) and 3(b).[32] Williams avers that the Commission has made clear that any offering which permits the transmission of information between two or more points by means of electronic communications facilities falls within its jurisdiction.[33] EDS, too, claims that the Commission's authority over interstate communications by

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[21] SWB further argues that the record with respect to whether the provision of dark fiber service is a communications service subject to our Title II jurisdiction is deficient, that the Commission acknowledged as much in the *ICB Order*, and that a rulemaking proceeding is needed to address this issue. SWB Application at 3-4; SWB Reply at 11-12. Williams responds that the Commission need not proceed by formal rulemaking or conduct further proceedings to develop a greater evidentiary record on this question, that the only requirement for its resolution is that the issue be squarely presented and carefully considered, and that this requirement is met in this proceeding. Williams Opposition (SWB) at 8. We find that the Commission has provided ample opportunity for comment on this issue, the applicants have taken full advantage of that opportunity, and there is ample legal precedent to guide us in reaching an informed determination. SWB's claim that the Commission has acknowledged the insufficiency of the record in this proceeding is baseless. The language SWB quotes to support this allegation described the record in the dark fiber ICB proceeding in CC Docket No. 88-136 and is irrelevant to the record in this proceeding. We also find that a rulemaking proceeding is not necessary to resolve this issue. The decision to proceed by rulemaking or adjudication lies within the informed discretion of the agency. *E.g., Southern Bell Tel. and Tel. v. FCC*, 781 F.2d 209, 216 n.8 (D.C. Cir. 1986) (*Southern Bell*); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) (*Chenery*). We have chosen to proceed by adjudication and have not been presented with any argument or evidence to persuade us to reverse this decision.

[22] *See, e.g., ICB Order*, 4 FCC Rcd at 8645; *Reconsideration Order*, 5 FCC Rcd at 4847 n.15. *See also Suspension Review Order*, 6 FCC Rcd at 4776.

[23] Graphnet Systems, 73 FCC 2d 283, 287 (1979) (*Graphnet*).

[24] 47 U.S.C. § 152(a) (emphasis added). The courts and the Commission have held that 47 U.S.C. §§ 151, 152, and other provisions of the Communications Act are to be construed broadly and expansively. *See, e.g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (*Pottsville*) (underlying the Communications Act is recognition of the "rapidly fluctuating" nature of the communications field and of the corresponding need for the Commission to "possess sufficient flexibility to adjust itself" to this rapid change); *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943) (*NBC*) (Congress granted the Commission a "comprehensive mandate" with "not niggardly but expansive powers" over the provision of communications services); *General Tel. of the Southwest v. FCC*, 449 F.2d 846, 853 (5th Cir. 1971) (*General Telephone*) (the intent of Congress was to "endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications"); *Graphnet*, 73 FCC2d at 288 (the Commission has "broad and flexible regulatory powers regarding interstate and foreign communications").

[25] 47 U.S.C. § 153(a).

[26] *Graphnet*, 73 FCC2d at 288. A common carrier is defined by the Act as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio ...." 47 U.S.C. § 153(h).

[27] *See, e.g.*, Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, 7 FCC Rcd 3528, 3531 (1992).

[28] SWB Application at 3-4; SWB Reply at 11-12; US West Application at 8-9.

[29] SWB Application at 6-7; SWB Reply at 11; US West Application at 10 n.34. SWB also argues that dark fiber service is not perceived as a communications service because no standard definition exists within the industry for dark fiber service, and there are no national or international standards or guarantees for items such as availability and bit error rate. SWB Application at 4. We do not agree. The lack of industry or international definitions or standards is irrelevant to whether dark fiber service is perceived as a communications service.

[30] US West Application at 10.

[31] *Id.* at 10 n.33.

[32] Williams *Ex Parte* Presentation (Oct. 25, 1991) at 2 (Williams *Ex Parte*).

[33] *Id.* at 2 (*citing Graphnet*, 73 FCC2d at 288-89).

wire or radio is "far-reaching"[34] and is reflected in the expansive definition of "wire communication" under Section 3(a) of the Act.[35]

15. EDS terms as disingenuous the BOCs' claim that dark fiber service is a facility and not a communications service. EDS cites the definition of "communication by wire" in Section 3(a)[36] and alleges that Title II of the Act is written in terms of both facilities and services, and in some cases uses the terms interchangeably.[37] EDS further states that the Commission itself has described the provision of communications common carrier services in terms of the provision of facilities.[38] EDS also notes that special construction has been subject to common carrier tariff regulation under Title II for decades.[39]

16. EDS and Williams claim that the nature of the service does not depend on whether the electronics are supplied by the carrier or the customer. EDS notes that the BOCs also tariff "dim fiber" service, where the customer provides the electronics at one end and the carrier provides the electronics at the other end.[40]

17. We find that the BOCs' provision of dark fiber service is "wire communication" as defined by the Act. The Act's definition of "wire communication" is "far-reaching"[41] and clearly encompasses any carrier offering which permits the transmission of information between two or more points by means of electronic communications facilities, including all instrumentalities, facilities, apparatus, and services incidental to such transmission.[42] Dark fiber service permits the transmission of information, by other like connection,[43] between two or more customer premises (using customer-provided electronics). Accordingly, we find that dark fiber service clearly fits within the category of "transmission ... by wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services ... incidental to such transmission."[44] and thus constitutes "wire communication" under the Act.[45]

18. Our conclusion that the BOCs' dark fiber service constitutes "wire communication" under the Act is further supported by the fact that the BOCs provide dark fiber service in the same manner in which they provide dim fiber service and lit fiber service. The BOCs' provision of dim fiber service under tariff, despite the fact that the customer provides the electronics for the fiber termination on the customer's premises, undercuts their argument that the identity of the electronics provider is relevant to whether a carrier offering constitutes communication by wire. Significantly, the BOCs have never challenged the Commission's Title II jurisdiction over dim fiber service. Thus, the fact that the customer, and not the carrier, provides the electronics to power the dark fiber is simply irrelevant to our determination that dark fiber service constitutes "communication by wire" under the Act. The similarities in the BOCs' provision of lit, dim, and dark fiber service also undercut the BOCs' allegation that dark fiber service constitutes facility construction outside the scope of Section 3(a), not communication by wire within the scope of Section 3(a). In their provision of lit, dim, and dark fiber service the BOCs: (1) provide service between customer premises specified by the customer; (2) retain ownership of the underlying transmission facilities over which the customer's messages are transmitted; (3) lease the fiber facilities to customers for a term of months or years; (4) maintain and repair the fiber optic cable; and (5) provide credit allowances for interruptions of service. Each of these services entails some combination of BOC ownership, control, or maintenance of the fiber optic facilities used for transmission by wire after construction, thereby contradicting the BOCs' claim that provision of dark fiber service constitutes facility construction, not "communication by wire."

2. Common Carriage

19. The BOCs argue that they never made their dark fiber service offerings generally available.[46] They claim that all of their dark fiber service ICB arrangements have been in response to limited numbers of customer-initiated requests for service.[47] Bell Atlantic contrasts its lack of a general offering for dark fiber service with what it terms the general offering of DS3 service in its Tariff No. 1, which Bell Atlantic states listed the rate for DS3 service as

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[34] EDS *Ex Parte* Presentation (Oct. 25, 1991) at 3-4 (EDS *Ex Parte)* (*citing* Second Computer Inquiry, 77 FCC2d 384, 451 (1980) (*Computer II (Final Decision)*)).

[35] *Id.* at 4 (*citing* 47 U.S.C. § 153(a)).

[36] *Id.* at 7-8 (*citing* 47 U.S.C. § 153(a)).

[37] *Id.* at 8 (*citing* 47 U.S.C. § 202(a)).

[38] *Id.* (*citing* Industrial Radiolocation Services, 5 FCC2d 197, 202 (1966) (*Industrial);* Provision of Access for 800 Services, 6 FCC Rcd 5421, 5427 (1991) (*800 Access)*).

[39] *Id.* at 5 n.10 (*citing* Second Computer Inquiry, 72 FCC2d 359, 417 (1979) (*Computer II (Tentative Decision)),* 8-9. EDS also points out that each BOC had annual construction expenditures of approximately $1 billion, and thus can hardly claim they are not in the business of facility construction. *Id.*

[40] Customers of dim fiber service provide their own electronics to generate a fiber optic signal at their end of the route while the LEC provides electronics at its end to, *e.g.,* convert the signal from optical to electrical (and back to optical) for transmission through the LEC's network.

[41] *Computer II (Final Decision),* 77 FCC2d at 451.

[42] *Graphnet,* 73 FCC2d at 288-89 (*citing* 47 U.S.C. §§ 153(a) and 153(b)). *See also Computer II (Final Decision),* 77 FCC2d at 451 ("all terminal equipment used with interstate communications services" are communication by wire as "incidental 'instrumentalities.'")

[43] "A fiber optic facility is a 'like connection' because it transmits communications through a solid medium within an enclosed system." Norlight, 2 FCC Rcd 132, 137 n.22 (*Norlight)* (*citing generally United States v. Midwest Video Corporation,* 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968) (*Southwestern Cable)*).

[44] 47 U.S.C. § 153(a).

[45] "Metallic" private line service is another example of a tariffed communications service which permits the transmission of messages, by wire, cable, or other like connection, between two or more customer premises using electronics provided by the customer, not the carrier. This service provides the customer with metallic channels, *i.e.,* unconditioned two-wire channels capable of signal transmission, between customer premises. The customer provides the electronics necessary to utilize the channels. Metallic private line service is most often used for the provision of alarm service.

[46] It is not clear whether the BOCs raise this argument to show that their dark fiber service offerings are not common carrier services, that the termination of dark fiber service does not constitute a discontinuance of service to the public, or both. We thus address this argument in both contexts.

[47] Bell Atlantic Application at 1 n.2, 2; Bell Atlantic Information Submission at 1 n.2; BellSouth Opposition at 7; US West Application at 6-7, 19.

"ICB" until general DS3 rates were filed.[48] SWB makes a somewhat different argument. SWB asserts that it has never offered "pure" dark fiber service at all, let alone on a generally available basis.[49] SWB further claims that it has only offered "specialized bit rate encumbered" dark fiber on an ICB, not a generally available, basis.[50] US West argues that although it filed a general dark fiber service tariff, it did so under protest and only because it was required to do so by the Commission in the *Reconsideration Order*.[51] In addition, US West contends that the dark fiber provider lacks control over, or knowledge of, the use to which the dark fiber facility is put by the customer.[52]

20. The BOCs' opponents contend that dark fiber service is a common carrier service. MCI contends that the BOCs' offering of dark fiber service ICB arrangements in their interstate tariffs on file with the Commission contradicts their statements that they have made no general offering.[53] Williams notes that in the past, SWB has characterized its dark fiber service offerings as "merely a form of DS3 service" and that this alleged distinction between "pure" and "encumbered" dark fiber service was first raised only after release of the Commission's *Waiver Order*.[54] Finally, EDS addresses US West's assertion that the dark fiber service provider lacks control over, or knowledge of, the eventual use of the dark fiber facility. EDS notes that one of the "hallmarks" of communications common carriage is the requirement that the system be designed to permit customers to "transmit intelligence of their own design and choosing."[55]

21. A "telephone company does not become a common carrier with regard to each telecommunications-related service it may provide simply by undertaking to provide some services on a common carrier basis."[56] We conclude, however, that the BOCs' provision of dark fiber service is a common carrier service within the meaning of the Act. The test for determining common carrier status was enunciated in *NARUC I* [57] and expanded upon in *NARUC II*.[58] These cases established two prerequisites for common carrier status: (1) a "quasi-public character" which arises when a carrier undertakes to carry for all people indifferently,'"[59] whether the carrier is under a legal compulsion to "hold [itself] out indiscriminately to the clientele [it] is suited to serve," or if it in fact does so without any legal compulsion;[60] and (2) provision of service over which customers "'transmit intelligence of their own design and choosing.'"[61]

22. We find that the BOCs' provision of dark fiber service meets both of the prerequisites established in the *NARUC I & II* cases and thus qualifies as a common carrier offering. With respect to the first prerequisite of a common carrier offering, the BOCs' initial ICB offerings of dark fiber service qualify as common carrier service because, as Williams observes,[62] the BOCs held themselves out indifferently as providers of dark fiber service without any legal compulsion to do so. We disagree with the BOCs' argument that their dark fiber ICB arrangements constituted a type of service offering which by its nature was of limited availability and thus could not be considered to be a general offering of service to the public. ICB pricing is in no way related to, and in no way affects, the general availability of a service offering.[63] It is simply a transitional method of pricing a tariffed service. Any refusal to provide a customer with dark fiber service pursuant to the tariff would have been a violation of the Communications Act.[64] The BOCs' current generally

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[48] Bell Atlantic Application at 2 n.3.

[49] SWB Application at 6. SWB defines "pure" dark fiber as "unencumbered bare fiber optic cable," *i.e.*, dark fiber without bit rate restrictions. *Id. See also* SWB Reply at 11.

[50] SWB Application at 7. SWB states that under this arrangement, the customer receives an optical interface, which is delivered at a fixed transmission speed, at both ends of the circuit, *i.e.*, dark fiber with bit rate restrictions. *Id.*

[51] US West Application at 6-7, 19. As noted in Section II, *supra*, all four BOCs subject to this proceeding were required to file a dark fiber service tariff with generally available averaged rates.

[52] *Id.* at 10 n.33.

[53] MCI Petition (Bell Atlantic) at 2 n.2; MCI Petition (BellSouth) at 2 n.2; MCI Petition (SWB) at 2 n.2; MCI Petition (US West) at 2 n.2.

[54] Williams Opposition (SWB) at 4-5. Williams argues that although SWB's ICBs for its dark fiber service arrangements typically identified a specific bit rate transmission speed, the fiber service SWB provides in all instances is "unlit" (*i.e.*, without terminating electronics) and can accommodate a wide range of transmission speeds. *Id.* at 2.

[55] EDS *Ex Parte* at 6-7 (*quoting NARUC v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976) (*NARUC II*)).

[56] Detariffing the Installation and Maintenance of Inside Wiring, 1 FCC Rcd 1190, 1192 (1986) (*Inside Wiring*) (*citing NARUC II*, 533 F.2d at 608), *recon.*, 3 FCC Rcd 1719 (1988), *remanded sub nom. NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989), *tentative decision on remand*, 5 FCC Rcd 7257 (1990), *final decision on remand*, 6 FCC Rcd 6006 (1991).

[57] *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir 1976), *cert. denied*, 425 U.S. 992 (1976) (*NARUC I*).

[58] *NARUC II*, *supra*, note 55.

[59] *NARUC I*, 525 F.2d at 641 (*quoting Semon v. Royal Indemnity Co.*, 279 F.2d 737, 739 (5th Cir. 1960) (*Semon*); *citing* numerous cases *id.* n.58); *NARUC II*, 533 F.2d at 608 (*citing Semon* and cases cited in *NARUC I*, 525 F.2d at 641 n.58).

[60] *NARUC I*, 525 F.2d at 641 (*citing Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211-12 (1927)); *NARUC II*, 533 F.2d at 608 (*citing* same case).

[61] *NARUC II*, 533 F.2d at 609 (*quoting Industrial*, 5 FCC2d at 202; *citing* Frontier Broadcasting Co. v. FCC, 24 FCC 251, 254 (1958) (*Frontier*)). The *NARUC II* court noted that this prerequisite to common carrier status was mentioned but not discussed in *NARUC I*. *Id.* (*citing NARUC I*, 525 F.2d at 641 n.58).

[62] Williams Petition (Bell Atlantic) at 1-2; Williams Opposition (SWB) at 2; Williams Final Reply (SWB) at 7.

[63] ICB pricing is usually used when a carrier adopts a practice of developing a price for a particular service in response to each customer request for the service. It represents a departure from the normal practice in the telecommunications industry. Even if carriers establish multiple pricing options for a particular service, the options are usually described in a tariff that is generally available to the public. ICB pricing generally is a transitional method of pricing which is not unreasonably discriminatory when a carrier does not have enough experience with respect to a particular service to develop averaged rates. Once a common carrier has sufficient experience to develop averaged rates, the justification for ICB pricing no longer exists. *ICB Order*, 4 FCC Rcd at 8641-42; *Reconsideration Order*, 5 FCC Rcd at 4845.

[64] The BOCs' provision of dark fiber service on an ICB basis is analogous to their provision of DS3 service on an ICB basis. Both are generally available, common carrier services which were initially priced at ICB rates and which the Commission ultimately ordered to be priced at generally available, averaged rates. *ICB Order*, 4 FCC Rcd at 8641-42; *Reconsideration Order*, 5 FCC Rcd at 4845.

available dark fiber tariff offerings also meet the first prong of the *NARUC I & II* test. Since the *Reconsideration Order* instructed the BOCs to tariff generally available, averaged prices for their already generally available dark fiber tariff offerings (which were then priced on an ICB basis), the BOCs are under a legal compulsion to provide dark fiber service pursuant to the tariff. We do not agree with the BOCs' contention that since we mandated the filing of their present tariffs, we may not consider the tariffs in determining common carrier status. The compulsion to hold oneself out indiscriminately may result from a "statutory or other legal commandment."[65]

23. We also find irrelevant SWB's claim that it never offered "pure" dark fiber service, but only "specialized bit rate encumbered" dark fiber service. The fact that the terms of SWB's dark fiber service ICB arrangements specified a bit rate -- a term not mandated by the inherent technological capabilities of dark fiber service and which could be and was changed at will at the customer's request -- in no way alters the underlying service provided by SWB, *i.e.*, the provision of dark fiber transmission service capable of accommodating a wide range of transmission speeds.[66] The rates, terms, and conditions of a carrier's service offering are not the appropriate focus of a Section 214 discontinuance proceeding,[67] and we do not consider them here.

24. With respect to the second prerequisite of a common carrier offering, we find that the BOCs' dark fiber service offerings do enable customers to transmit intelligence of their own design and choosing. US West itself concedes this point. Accordingly, we find that the BOCs' offerings of dark fiber service qualify as common carrier service under the test established in *NARUC I* and *NARUC II*.

B. Applicability of Section 214 to Dark Fiber Service

25. Section 214 states that: "No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby."[68] The BOCs argue that withdrawal of dark fiber service does not fall within the scope of Section 214; their opponents argue that it does. We find that the BOCs' withdrawal of dark fiber service does fall within the ambit of Section 214. Accordingly, the BOCs may not terminate their dark fiber service unless they first receive authorization under Section 214.

1. Discontinuance

26. The BOCs contend that their cessation of dark fiber service does not constitute a discontinuance within the meaning of Section 214. We disagree.

27. First, the BOCs argue that they only offered dark fiber service on an ICB basis and thus never made their dark fiber service offerings generally available to the public.[69] They imply that termination of dark fiber service is not a discontinuance of service to the public because the service was never offered to the public in the first place. Their opponents note that the BOCs have offered dark fiber service on an ICB basis under their generally available access tariffs for years.[70]

28. SWB further alleges that since it never offered "pure" dark fiber service, and is willing to grandfather its "specialized bit rate encumbered" dark fiber service,[71] its Section 214 application is filed to discontinue provision of specialized bit rate encumbered dark fiber service on a prospective basis only, and to gain Commission approval to refrain from offering pure dark fiber service.[72] SWB insists that these actions do not constitute discontinuance of existing service.[73] We disagree with SWB's characterization of its dark fiber service offering (as explained in paragraph 23 and note 66, *supra*). Accordingly, we also disagree with SWB's characterization of its Section 214 application.

29. The BOCs next contend that the availability of alternative services means that there will be no discontinuance of the type contemplated by Section 214.[74] Williams disputes the BOCs' contention. Williams argues that SWB itself has conceded that "present dark fiber ICB customers may experience disruption in their business if

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[65] *NARUC II*, 533 F.2d at 608.

[66] We note that in a previous proceeding we also disagreed with SWB's alleged distinction between types of dark fiber services because SWB's dark fiber customers had changed transmission speeds over their existing dark fiber facilities with minimal or no change in the terms, conditions, and rates under which the customers originally received dark fiber service. *See Prescription Order*, 6 FCC Rcd at 4894. Moreover, we required SWB to remove the bit rate restrictions it had initially included in the dark fiber tariff we required it to file in 1990 because we found such restrictions to be unjust and unreasonable. *Id.*

[67] Western Union Telegraph Co., 74 FCC2d 293, 295 (1979) (*Western Union*). Rather, such factors are appropriately considered in the tariffing process as governed by 47 U.S.C. §§ 201-205. The focus of a Section 214 proceeding is on loss or impairment of service. *Id.*

[68] 47 U.S.C. § 214(a).

[69] As noted in note 46, *supra*, since it is not clear whether the BOCs raise this argument to show that the termination of dark fiber service is not a discontinuance of service to the public, that their dark fiber service offerings are not common carrier service, or both, we discuss it in both contexts. *See* Section III.A.2., *supra*, for a complete summary of the BOCs' pleadings with respect to the general availability issue.

[70] *See* Section III.A.2., *supra*, for a complete summary of the responses of the BOCs' opponents with respect to the general availability issue.

[71] SWB Application at 6-7, 10-11; 11 n.17, 13; SWB Reply at 8-11. Whether SWB could grandfather the ICB arrangements became moot when the Commission ordered the ICBs' replacement with generally available averaged tariffed rates. *See* ¶ 32, *infra*.

[72] SWB Application at 6.

[73] *Id.* at 9-10, 13, 14; SWB Reply at 7-8.

[74] *E.g.*, Bell Atlantic Application at 6; BellSouth Application at 2; SWB Application at 2; USW Application at 11-12. BellSouth further states that, at one time, it offered DS4 service, but withdrew this service from its tariff in 1989 on the grounds that other high capacity services were suitable alternatives, and that no Section 214 proceeding was required. BellSouth Opposition at 2 n.1. We express no opinion on the legality of BellSouth's alleged unilateral withdrawal of DS4 service, which BellSouth claims was premised on the availability of alternative services and thus sets a precedent for withdrawal of its dark fiber service without Section 214 authorization. The alleged withdrawal of DS4 service offers no such precedent because there was no Bureau or Commission decision regarding this matter.

not permitted to retain the benefits of their dark fiber ICB contracts."[75] It contends that SWB's "dramatic reversal" on this point is "wholly unexplained."[76] Williams and MCI add that none of the alternatives to BOC-provided dark fiber service are satisfactory replacements.[77]

30. We are not persuaded by the BOCs' argument that Section 214 authorization is not required because the existence of alternative services results in no discontinuance. The Commission has stated that "the notice and discontinuance requirements of Section 214(a) are directed at preventing a loss or impairment of a *service offering* ... without adequate public interest safeguards."[78] Thus, while the existence of alternative services may justify discontinuance, it does not obviate need for a Section 214 finding.

31. The BOCs' also allege that termination of their dark fiber service is not a discontinuance because they do not intend to discontinue use of the specific facilities over which dark fiber service is now provided. The essence of their argument seems to be that since the physical facilities connecting customers to the national telecommunications network will remain in place, and since the BOCs are willing to provide other services over these facilities, there will be no loss of connectivity and thus no discontinuance of service. This is not dispositive, however, of the discontinuance issue with respect to dark fiber service. "Section 214(a) [is] directed at preventing a loss or impairment of a *service offering*."[79] With the termination of dark fiber service there would be a loss of a service offering, and the provision of service alternatives, even over the same physical facilities, does not change this.

32. The BOCs argue that deletion of dark fiber service from their tariffed offerings is not a discontinuance because they will "grandfather" existing dark fiber service ICBs.[80] Since the BOCs filed their applications and other pleadings, however, the ICBs expired and were replaced by tariffs with generally available, averaged rates pursuant to the Commission's *Reconsideration Order*. Thus, grandfathering the ICBs is a moot point. Even if the ICBs were still in effect, grandfathering them would only defer the discontinuance of dark fiber service to the ICB customers; and dark fiber service would not be available for potential future customers. The same is true with respect to "grandfathering" present customers under the BOCs' existing tariffs.

33. US West contends that its departure from the dark fiber service business is not a discontinuance under the Commission's Rules because discontinuance of dark fiber service is not specifically listed in Section 63.60(a).[81] We disagree. Section 63.60(a) clearly states that "'Discontinuance, reduction, or impairment of service' *includes, but is not limited to* the following: ..." (emphasis added). Moreover, Section 63.62(f) specifically requires formal application for "[a]ny other type of discontinuance, reduction or impairment of telephone service not specifically provided for by other provisions of this part."[82]

34. BellSouth characterizes its withdrawal of its dark fiber service not as a discontinuance of service, but only a modification of its tariff offering that merely prevents customers from using their own electronics.[83] In support, BellSouth cites *Western Union*,[84] wherein BellSouth alleges the Commission found that modification of an offering so that the customer could no longer provide certain functions, such as multiplexing, with its own facilities was not a discontinuance of service requiring a Section 214 certification.[85]

35. BellSouth's reliance on *Western Union* in support of this contention is misplaced. *Western Union* is readily distinguishable. In *Western Union*, AT&T eliminated its offering of group and supergroup channels, and substituted a more costly offering of individual voice grade channels which obviated the need for use of Western Union's multiplexing equipment. The Commission found that AT&T's action did not constitute a service discontinuance because AT&T was "merely transferring from provision under contract to provision by tariff."[86] In the instant case, however, dark fiber is already a tariffed service. In addition, while the Commission found that AT&T's modification of its offering did not constitute a service discontinuance, it did not make this finding on the grounds suggested by BellSouth, *i.e.*, that the mere modification of a service offering that prevents customers from using their own electronics does not give rise to a Section 214 issue. Rather, relying, *inter alia*, on *TELPAK*,[87] the Commission found that Western Union's inability to use its multiplexing equipment, and the fact that its costs would increase under AT&T's new tariff offering, did not present a Section 214 question because a tariff action that merely increases costs or rates without affecting provision of service to end user customers does not compel Section 214 certification.[88] This, too, distinguishes *Western Union* from the instant case. Dark fiber service differs from the BOCs' other high capacity access

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[75] Williams Opposition (SWB) at 11-12 (*quoting* SWB Petition for Reconsideration, filed Sept. 5, 1990, CC Dkt. No. 88-136, at 5-6); Williams Final Reply (SWB) at 3.

[76] Williams Final Reply (SWB) at 3.

[77] *See* Williams Petition (BellSouth) at 6-8; Williams Reply (BellSouth) at 4-5; Williams Petition (Bell Atlantic) at 7-9; Williams Reply (Bell Atlantic) at 3-4; Williams Opposition (SWB) at 13-14; Williams Final Reply (SWB) at 3, 8; MCI Petition (US West) at 4-5; MCI Petition (BellSouth) at 7-8; MCI Petition (Bell Atlantic) at 5-6; MCI Petition (SWB) at 4-5.

[78] *Western Union*, 74 FCC2d at 295 (emphasis added).

[79] *Id.*

[80] Bell Atlantic Application at 6 n.17; Bell Atlantic Opposition at 4 n.13; US West Application at 13-15, 17; SWB Application at 10-11, 11 n.17, 13; SWB Reply at 8-10.

[81] US West Application at 8 (*citing* 47 C.F.R. § 63.60(a)).

[82] 47 C.F.R. § 63.62(f).

[83] BellSouth Application at 2-3.

[84] *Western Union, supra*, note 67.

[85] BellSouth Application at 3; BellSouth Opposition at 4.

[86] *Western Union*, 74 FCC2d at 296.

[87] AT&T Termination of TELPAK Service, 64 FCC2d 959 (*TELPAK*), *aff'd in relevant part sub nom. ARINC v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980) (*ARINC*), *cert. denied*, 451 U.S. 920 (1981).

[88] *Western Union*, 74 FCC2d at 296-97 (*citing, inter alia, TELPAK*, 64 FCC2d at 965). The Commission found in *Western Union* that there was no discontinuance of service to a community because Western Union had not shown that AT&T's withdrawal of group and supergroup channels would, in turn, discontinue, reduce, or impair service to Western Union's customers.

services in more ways than in the rates charged.[89] Termination of dark fiber service would also affect end user customers.[90] Thus, in contrast to the situation present in *Western Union*, the termination of dark fiber service constitutes a service, not a rate, discontinuance that affects service to end user customers, thereby raising a Section 214 issue.

36. Finally, SWB and US West contend that although specialized dark fiber arrangements will not be available to new customers, such customers will experience no discontinuance or impairment of service vis-a-vis their current service levels.[91] This argument is irrelevant. Where there are existing customers for a service, the issue is whether these customers will experience a service discontinuance.

2. Community

37. The BOCs contend that their discontinuance of dark fiber service does not affect a community within the meaning of Section 214. We are not persuaded by their arguments.

a. Geographic Area

38. Bell Atlantic argues that there is no identifiable "community" because the discontinuance of its dark fiber service would occur throughout its service area.[92] In essence, Bell Atlantic seems to argue that a community must be a politically defined geographic area, such as a town or city, and therefore a geographically more widespread discontinuance does not fall within the ambit of Section 214. We do not agree. The Commission has defined "community" as the "using public,"[93] *i.e.*, end user customers. Nothing in this definition limits the "using public" to a particular politically or geographically defined area such as a city, county, or town. Therefore, an impairment of service to a geographic area either smaller or greater than one city, even as great as a BOC's entire region, can be a discontinuance to a community.[94] Thus, we reject Bell Atlantic's argument that its proposed discontinuance is not a discontinuance to a "community" within the scope of Section 214.

b. Customer Identity

(1) End User Customers

39. The Commission has defined "community" as the "using public."[95] Thus, the BOCs' end user customers, by definition, are encompassed within the term community under Section 214.

(2) Carrier Customers

40. BellSouth, however, has raised the question of whether customers who are carriers fall within the definition of community. BellSouth asserts that by defining "community" for Section 214 purposes to mean the "using public," the Commission has excluded carriers.[96] US West and Bell Atlantic allege that the discontinuance provisions of Section 214 are not applicable to service provided to another carrier, unless the discontinuance can be shown to impair service to the public, and that the carrier customer bears the burden of proving that there will be a resulting discontinuance of service to its customers.[97]

41. Williams replies that BellSouth's allegation that carrier customers are not part of a "community" is "entirely without merit."[98] EDS contends that the requirements of Section 214 are applicable because discontinuance of dark fiber service would affect non-carrier end users as well as interexchange carriers.[99]

42. The Commission has clearly stated that "carrier-to-carrier interconnection relationships ... come within the context of Section 214(a)."[100] although there are "some important differences between this type of relationship and the more usual type involving a carrier and its non-carrier customer."[101] Specifically:

> In determining the need for prior authority to discontinue, reduce or impair service under Section 214(a), the primary focus should be on the end service provided by a carrier to a community or part of a community, *i.e.*, the using public. Thus, in situations where one carrier attempts to invoke Section 214(a) against another carrier, concern should be had for the ultimate impact on the community served rather than on any technical or financial impact on the carrier itself. ... If there has been a discontinuance, reduction or impairment of service

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[89] With dark fiber service, the customer leases the entire fiber (which contains numerous channels), must provide the terminating electronics at its customer premises, and fully controls the bit rate and other factors relating to transmission over the dark fiber. In contrast, with other high capacity access services, such as DS3 service, the BOCs lease to the customer individual (possibly multiple) channels within a fiber, provide electronics at various points throughout their networks to power the fiber, and control the bit rate and other factors relating to transmission over the channel.

[90] *See* Section III.B.3, *infra*, for further discussion of this issue.

[91] SWB Reply at 10; US West Application at 14.

[92] Bell Atlantic Opposition at 5-6.

[93] *Western Union*, 74 FCC2d at 296.

[94] *ITT World Communications, Inc. v. New York Telephone Co.*, 381 F. Supp. 113, 121 (S.D.N.Y. 1974) (*ITT*) ("No authority has been cited to the effect that 'a community' in Section 214 means only a geographical entity like a town or village. ... [N]othing has been offered to show that community' does not include an economic community' of users, such as international record carriers or domestic satellite carriers.").

[95] *See* ¶ 38, *supra*.

[96] BellSouth Application at 2 (*quoting Western Union*, 74 FCC2d at 296), 5; BellSouth Opposition at 2.

[97] US West Application at 7 (*citing Western Union*, 74 FCC2d at 295-97; Lincoln County Telephone System, 81 FCC2d 328, 331-33 (1980) (*Lincoln*); US West Opposition at 6 (*citing* same cases); Bell Atlantic Application at 3 n.9.

[98] Williams Petition (BellSouth) at 1, 2 (*citing Western Union*, 74 FCC2d at 296).

[99] EDS Comments (US West) at 4 n.7.

[100] *Western Union*, 74 FCC2d at 296 (*citing, inter alia, ITT*).

[101] *Id.*

> to the [latter] carrier's customer, we would then need to determine whether it violated Section 214(a).[102]

Thus, the fact that carriers comprise part or all of the customer base for the service to be withdrawn does not bar the application of Section 214.[103] If the proposed discontinuance would result in discontinuance or impairment of service to the carrier customer's customers, who, as the using public, fall directly within the definition of community in Section 214, a Section 214 issue would arise.

3. Applicability Determinations

a. BOCs' End User Customers

43. Bell Atlantic and SWB indicate that their dark fiber service customer base consists partially of end users.[104] In Sections III.B.1. and III.B.2, *supra*, we determined that withdrawal of dark fiber service by the BOCs would constitute discontinuance of service to their end user customers. Since the BOCs' end user customers are the "using public" and thus fall directly within the definition of community under Section 214, we find that Section 214 authorization is required for discontinuance of dark fiber service to Bell Atlantic's and SWB's end user customers.

b. BOCs' Carrier Customers

44. Bell Atlantic and SWB also indicate that their dark fiber service customer base consists partially of carriers.[105] BellSouth and US West allege that all their dark fiber service customers are carriers.[106] In Sections III.B.1 and III.B.2., *supra*, we determined that the BOCs' withdrawal of dark fiber service would constitute a discontinuance of service to their carrier customers. To determine whether a Section 214 issue arises with respect to such discontinuances we must determine whether service to the customers of the BOCs' carrier customers would be discontinued or impaired as a result.

45. The BOCs' opponents maintain that telecommunications service to their customers will be discontinued, reduced, or impaired if their BOC-provided dark fiber service is discontinued.[107] Williams contends that alternative services are not satisfactory substitutes for BOC-provided dark fiber service. Williams argues that: (1) the BOCs' other tariffed access offerings are higher priced and less reliable than dark fiber service because they do not permit Williams to provide and maintain its own terminating electronics;[108] (2) access services from competitive access providers are neither immediately nor ubiquitously available;[109] and (3) self-construction of dark fiber facilities is not always possible due to difficulties in procuring rights-of-way.[110] MCI further contends that, on an ongoing basis, it expects future alternatives to be similarly unsatisfactory.[111]

46. The BOCs respond that the technical and financial factors relied on by their opponents are not relevant to establishing the applicability of Section 214 to service withdrawals to carrier customers.[112] The BOCs argue that when a carrier seeks to invoke Section 214(a) against another carrier, the focus is on the ultimate impact on the community served rather than on any technical or financial impact on the carrier itself.[113]

47. The BOCs also argue that their carrier customers have failed to show any potential for an impairment of service to their customers.[114] The BOCs allege that their

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[102] *Id.* (footnotes omitted). *See also Lincoln*, 81 FCC2d at 332 (*citing Western Union); ITT,* 381 F. Supp. at 121 ("the inconvenience to the customers of the international record carriers is at least as great as to the carriers themselves").

[103] The BOCs argue that even if a discontinuance to a carrier customer does require Section 214 authorization, a lower standard for the grant of such certification applies. We find that the applicability of Section 214 to carrier customers is solely a threshold issue. Once a determination is made that Section 214 authorization is necessary for such a discontinuance, the legal standard for grant of a Section 214 certificate is the same as for discontinuance of service to non-carrier, end user customers, *i.e.*, that the public interest not be adversely affected thereby. *See* Section III.C., *infra*, for further discussion of the legal standard for service discontinuation.

[104] *See* Bell Atlantic Application at 3 n.9 ("[m]ost of Bell Atlantic's dark fiber facilities are provided to interexchange carriers"); SWB Application at 13 ("[n]o end user, whether a SWBT end-user customer or a customer of a carrier served by SWBT, ... "); SWB Reply at 21 ("interexchange carriers ... comprise the majority of SWBT's specialized dark fiber customer base").

[105] *See* note 104, *supra*.

[106] BellSouth Application at 2 ("all customers for dry fiber provided by BellSouth are carriers"); US West Application at 7 n.27 ("[a]ll of USWC's existing dark fiber service ICB customers are interexchange carriers").

[107] MCI Petition (US West) at 3; MCI Petition (BellSouth) at 4, 5-7; MCI Petition (Bell Atlantic) at 4; MCI Petition (SWB) at 3; Williams Petition (BellSouth) at 5-6, 9; Williams Reply (BellSouth) at 2; Williams Petition (Bell Atlantic) at 8, 9; Williams Reply (Bell Atlantic) at 2; Williams Opposition (SWB) at 12-13; Williams Final Reply (SWB) at 2, 6.

[108] Williams Petition (Bell Atlantic) at 9; Williams Reply (Bell Atlantic) at 3-4; Williams Petition (BellSouth) at 7-8; Williams Reply (BellSouth) at 4; Williams Opposition (SWB) at 14; Williams Final Reply (SWB) at 3-4.

[109] Williams Petition (BellSouth) at 6-8 (*citing* the Commission's Fiber Deployment Update which states that urban fiber systems (*i.e.*, systems provided by competitive access providers) do not in their present form provide ubiquitous access, and thus customers may still be dependent on the local telephone companies); Williams Reply (BellSouth) at 5; Williams Petition (Bell Atlantic) at 8; Williams Reply (Bell Atlantic) at 3 (*citing* the Commission's Fiber Deployment Update); Williams Opposition (SWB) at 13; Williams Final Reply (SWB) at 8.

[110] Williams Petition (BellSouth) at 7; Williams Reply (BellSouth) at 5; Williams Petition (Bell Atlantic) at 8; Williams Reply (Bell Atlantic) at 3; Williams Final Reply (SWB) at 8.

[111] MCI Petition (US West) at 4-5; MCI Petition (BellSouth) at 7-8; MCI Petition (Bell Atlantic) at 5-6; MCI Petition (SWB) at 4-5.

[112] The BOCs allege that their carrier customers claim that alternatives to BOC-provided dark fiber service are unsatisfactory because: (1) the cost is higher; (2) the equipment the carriers use in connection with dark fiber would be rendered unnecessary; (3) significant planning and construction would be necessary to switch to alternative services; (4) they permit less operational flexibility than dark fiber service; (5) competitive access providers offer services only in limited areas; and (6) they want to continue receiving dark fiber service from the BOCs. Bell Atlantic Application at 4 n.11, 6 n.16; BellSouth Opposition at 3-5; SWB Reply at 7; US West Opposition at 5.

[113] BellSouth Opposition at 4 (*citing Western Union,* 74 FCC2d at 296); US West Opposition at 5 (*citing* same case).

[114] BellSouth Opposition at 5; US West Opposition at 6.

customers could install their own dark fiber.[115] The BOCs further maintain that numerous firms can be hired to construct dark fiber facilities.[116] They also contend that high capacity services are available from competitive access providers.[117] In addition, the BOCs allege that their other high capacity services, such as DS1 or DS3 service, are comparable alternatives.[118] Finally, the BOCs claim that digital microwave systems are viable alternatives.[119] SWB challenges the credibility of Williams' claim that its customers would experience a decrease in the level of service quality if Williams were not able to control the terminating electronics.[120]

48. As an initial matter, we note that the use of technical or financial factors in determining the applicability of Section 214 to service withdrawals to carrier customers is not precluded by the Commission's statement in *Western Union* that "concern should be had for the ultimate impact on the community served rather than on any technical or financial impact on the carrier itself."[121] Taken in context with the entire discussion of this issue, it is clear that the intent in *Western Union* [122] was merely to exclude technical or financial considerations when their impact was limited solely to the carrier customer, and did not affect the carrier customer's ability to continue to provide service to its customers. In *Western Union*, Western Union argued that AT&T's action caused it to lose some operational flexibility and therefore raised a Section 214 question. We dismissed this argument on the ground that "Western Union has not shown how this results in any loss or impairment of service to the customers it serves,"[123] not because it was based on a technical factor. Thus, under *Western Union*, if a service discontinuance to a carrier causes it to make technical changes in the way it provides service to its customers, or requires that it pay more for service alternatives in order to continue providing service to its customers, but in no way impairs its ability to continue providing service to its customers, then no Section 214 issue arises. However, where the technical or financial impact on the carrier customer is such that it would lead to discontinuance or impairment of service to its customers, such considerations may establish that Section 214 authorization is required.

49. We also note that the record in this proceeding appears to indicate that service to the public could be reduced as a result of the BOCs' discontinuance of dark fiber service to their carrier customers. The BOCs have not provided sufficient proof to demonstrate the availability of reasonable alternatives to their dark fiber service.[124] Therefore, we find that the carrier customers have demonstrated the potential for a service reduction to their customers, *i.e.*, the "using public," and the BOCs have not made a showing that a reduction of service to the using public will not occur. Accordingly, we find that Section 214 authorization is required for discontinuance of dark fiber service to Bell Atlantic's, BellSouth's, SWB's, and US West's carrier customers.

C. Legal Standard for Section 214 Discontinuance

50. The BOCs assert that the basic statutory test applied to a Section 214 application to discontinue service is whether the current or future public convenience and necessity will be adversely affected by such a discontinuance.[125] The BOCs contend that in balancing the relevant interests, the Commission must consider a number of factors including the financial impact on the common carrier, the need for the service in general, the need for the particular service in question, and the alternatives available to customers.[126]

51. Williams contends that the burden is on the discontinuing carrier to prove that discontinuance of a service offering is in the public interest.[127] MCI and Williams argue that the Commission should consider increased costs for alternative services, stranding of equipment presently in use, need for significant planning and construction to replace dark fiber service, and the availability and adequacy of alternative services.[128]

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[115] BellSouth Application at 3, 6, 8, 10; US West Application at 11-12; Bell Atlantic Application at 5, A-3; SWB Application at 12; SWB Reply at 20-21. US West asserts that throughout its service area other carriers have similar rights to use public rights-of-way for the placement of fiber optic cable, and that dark fiber users are experienced at dealing with this and other construction matters. US West Application at 12 & n.36. SWB argues that Williams has not claimed that it cannot install, or that it has not ever installed, dark fiber, and that MCI is able to do so since MCI has announced that it intends to deploy a fiber optic system for the University of San Diego. SWB Reply at 21.

[116] *See, e.g.*, Bell Atlantic Application at 5 n.14; BellSouth Application at 3, 8; SWB Reply at 18-20; US West Application at 12.

[117] BellSouth Application at 3, 6, 8, 10; US West Application at 12; SWB Application at 12; SWB Reply at 16-20; Bell Atlantic Application at 5 & nn.14-15, A-3.

[118] BellSouth Application at 2, 6, 8, 10; US West Application at 12, 15, 22; SWB Application at 11; SWB Reply at 7, 14; Bell Atlantic Application at 4-5.

[119] US West Application at 12; Bell Atlantic Application at 5, A-3.

[120] SWB Reply at 15. SWB further claims that Williams' concern over the quality of SWB's service and Williams' inability to monitor its own circuits should be alleviated by the fact that SWB plans to deploy network performance monitoring capability for all DS1 and higher bit rate services. SWB claims that this optional feature will give SWB real-time network monitoring ability through which its network facility will be alerted to trouble on the network upon its occurrence. *Id.* at 16.

[121] *Western Union*, 74 FCC2d at 296.

[122] *Id.*

[123] *Id.* at 297.

[124] A detailed discussion of these issues is provided in Section III.D., *infra*.

[125] Bell Atlantic Application at 3 (*citing* Inquiry into the Problems of Public Coast Radiotelegraph Stations, 67 FCC2d 790, 795 (1978) (*Public Coast);* SWB Reply at 6 (*citing* McCaw Communications Companies, Inc., 4 FCC Rcd 547 (1989) (*McCaw);* US West Application at 9 (*citing* 47 U.S.C. § 214(a); *Public Coast).*

[126] Bell Atlantic Application at 3 (*citing Public Coast*, 67 FCC2d at 796-97); SWB Reply at 6; US West Application at 9 (*citing Public Coast).*

[127] Williams Petition (BellSouth) at 3 (*citing ITT*, 381 F. Supp. at 120); Williams Opposition (SWB) at 9-10 (*citing* same case); Williams Petition (Bell Atlantic) at 5 (*citing* same case). *See also* CTI Comments (Information Submissions) at 10 (burden lies with the carrier seeking to have the Commission authorize the termination of a Section 214 authority which was given in the first place because provision of the service was in the public interest and necessity, and which was willingly entered by the carrier).

[128] Williams Petition (BellSouth) at 5-9; Williams Reply (Bell-

52. The notice and discontinuance requirements of Section 214(a) are directed at preventing a loss or worsening of a service offering to a community or part thereof unless the Commission determines it is in the public interest.[129] Section 214(a) provides that:

> No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby.[130]

The burden is "cast upon the carrier which wishes to discontinue a service to make proper application for a certificate"[131] "that neither the present or future public convenience and necessity will be adversely affected by [such] discontinuance."[132]

53. The standard of the public convenience and necessity must be interpreted to secure the broad aims of the Communications Act as set forth in Section 1.[133] The application of this standard requires the Commission to balance the legitimate interests of both the carriers and the user community.[134] The benefits to a particular community or communities of continued operation must be weighed against the burden that would be imposed upon the carrier.[135]

54. A number of factors are considered in balancing the interests of the carrier and the user community. These factors include: (1) the financial impact on the common carrier of continuing to provide the service; (2) the need for the service in general; (3) the need for the particular facilities in question; (4) the existence, availability, and adequacy of alternatives;[136] and (5) increased charges for alternative services.[137] Judicial approval has been given to such factors.[138]

D. Demonstrations of Public Convenience and Necessity

55. After review of the record, we conclude that Bell Atlantic, BellSouth, SWB, and US West have failed to meet their burden of demonstrating that the public convenience and necessity will not be adversely affected by the proposed discontinuance of their dark fiber service. As we describe in greater detail below, the BOCs ask for blanket discontinuance of their dark fiber service throughout their operating regions, but fail to demonstrate that discontinuance on a region-wide scale would not harm the public interest. Specifically, the BOCs rely primarily on allegations of low demand for their dark fiber service, and the availability of alternative services or facilities to their dark fiber service customers, but fail to support their allegations with persuasive evidence. In addition, the BOCs make no claim that the continued provision of dark fiber service will cause them to lose money. On this record, we find that the BOCs will not suffer financial harm by continuing to provide dark fiber service, and that the BOCs have failed to demonstrate that users have adequate alternatives to their dark fiber service. Thus, our balancing of the interests of the carriers with those of the user community leads us to conclude that, on this record, the user community's need for continued dark fiber service outweighs the BOCs' desire to discontinue the service. Accordingly, we deny the applications for discontinuance of dark fiber service filed by Bell Atlantic, BellSouth, SWB, and US West. It is possible that these carriers may be able to more narrowly target their applications for discontinuance to those areas for which they can meet their burden of proof by demonstrating that the public interest will not be harmed by the discontinuance. This order does not prejudge our action on Section 214 discontinuance applications that are more narrowly tailored to address the concerns raised herein.

1. Burden on Carriers

56. As noted in Section III.C., *supra*, one factor we consider in performing a balancing analysis under Section 214 is the financial impact on the carrier resulting from continued provision of the service. In this case, none of the BOCs asserts that it will suffer financial harm by continuing to provide dark fiber (although SWB contends, without elaboration, that the service potentially impacts its capital investment plans).[139] The BOCs' opponents assert that the BOCs will not experience economic harm by continuing to provide dark fiber service and that the only reason the BOCs want to discontinue dark fiber service is because it is not as profitable as lit fiber

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South) at 2-5; Williams Petition (Bell Atlantic) at 7-9; Williams Reply (Bell Atlantic) at 3-4; Williams Final Reply (SWB) at 3-5; MCI Petition (USW) at 3-5; MCI Petition (BellSouth) at 3-5; MCI Petition (Bell Atlantic) at 5-6; MCI Petition (SWB) at 3-5.

[129] Wisconsin Bell, Authorization to Discontinue Service on its Broadband Channel Distribution System in Brookfield, Wisconsin, 7 FCC Rcd 4208, 4209 (1992) (*Wisconsin Bell*); *Western Union*, 74 FCC2d at 295; *Lincoln*, 81 FCC2d at 332.

[130] 47 U.S.C. § 214(a).

[131] *ITT*, 381 F. Supp. at 120.

[132] Type 400 Switching System Service, 63 FCC2d 371, 372 n.9 (1977) (*Type 400 Switching*) (*citing ITT*).

[133] *General Telephone*, 449 F.2d at 858 (*citing Western Union Division v. United States*, 87 F. Supp. 324, 335 (D.C. Cir. 1949) (*Western Union Division*)). Section 1 of the Act states that the purpose of the Commission is "to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151(a).

[134] *Public Coast*, 67 FCC2d at 795.

[135] *Id.* at 796; *Wisconsin Bell*, 7 FCC Rcd at 4209.

[136] *See Public Coast*, 67 FCC2d at 796-97. The quality and reliability of alternative services must be such that they will provide the same level of service to end users as does the service to be discontinued. Where the customer for the service to be discontinued is a carrier, alternative services must enable the carrier to maintain the same level of service to its customers as is possible with the service to be discontinued. *See Lincoln*, 81 FCC2d at 332-33.

[137] *Type 400 Switching*, 63 FCC2d at 372. This factor, however, may be outweighed by other considerations. *Id.*

[138] *See Western Union Division*, 87 F. Supp. at 335-36 (noting with approval the Commission's consideration of factors such as: the effects on service and facilities in the communities involved; the probable financial effects on the earnings of the companies involved; and the probable costs of service to the communities in question).

[139] *E.g.*, SWB *Ex Parte* Letter (June 26, 1991), Attachment at 1.

service.[140] We find that the BOCs have not demonstrated that they would incur significant economic costs if they were to continue to provide dark fiber service and therefore this factor weighs against a grant of the Section 214 requests.[141]

2. Interests of the User Community

57. We also evaluate the level of demand for the service for which discontinuance has been requested in performing a balancing analysis under Section 214. The BOCs contend that there is insignificant demand for their dark fiber service. They assert that demand for dark fiber service will continue to be limited because it is useful only on the high volume routes of the private networks of users such as interexchange carriers and large sophisticated business customers, and that customers do not consider dark fiber service to be essential or irreplaceable.[142] The BOCs also deny claims[143] that regulatory uncertainty has depressed the demand for dark fiber service.[144]

58. The BOCs' opponents assert that dark fiber service is needed to satisfy the present and future demands of users with large and highly sophisticated communications requirements. They further argue that even taking into account the artificial suppression of dark fiber service demand, the amount of customer interest exhibited is still significant when compared to the size of the market for dark fiber service as a whole. They also argue that once the artificial barriers erected by the BOCs are removed, they expect demand for dark fiber service to rise.[145]

59. While the record shows that present demand for the BOCs' dark fiber service is low for each BOC on a region-wide basis, the users commenting in this proceeding uniformly represent that they do have a need for dark fiber. In addition, some commenters state that regulatory uncertainty regarding dark fiber service may have dampened interest in the service to some extent. Moreover, the demand information supplied by the BOCs is insufficiently disaggregated to permit us to determine the extent of demand in discrete geographic areas. In any event, while low demand for a service may constitute a factor in a Section 214 determination, it could be outweighed by other public interest considerations such as the need for the service, the unavailability of adequate alternatives, and the absence of any burden on the carrier in continuing to provide the service.

60. The availability and adequacy of alternatives is also of importance in determining whether discontinuance of a service offering is warranted under Section 214. The BOCs allege that a grant of their Section 214 applications is warranted because adequate alternatives to their dark fiber service offerings are available region-wide. Bell Atlantic contends that its other high capacity access services are adequate substitutes to which its dark fiber customers could convert.[146] Bell Atlantic also alleges that its dark fiber customers are capable, in many cases, of constructing their own dark fiber facilities[147] and that the necessary rights-of-way for construction can be obtained from many sources.[148] Bell Atlantic asserts that contractors capable of installing fiber optic systems in those rights-of-way are numerous. In support, Bell Atlantic cites US West's assertion that over 200 contractors are approved to lay fiber optic cable for US West.[149] Bell Atlantic also contends that numerous non-carrier firms construct dark fiber facilities throughout Bell Atlantic's service area and that these firms use rights-of-way, conduit, and duct space obtained from a wide variety of sources in Bell Atlantic's territory.[150] In addition, Bell Atlantic states that local access competitors offer "fiber based access services" in urban areas throughout its region.[151] Finally, Bell Atlantic contends that digital microwave systems can also provide high capacity communications between customer premises.[152]

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[140] Williams Petition (Bell Atlantic) at 5-6 & n.2; Williams Reply (Bell Atlantic) at 2, 6 & n.3; EDS Comments (Bell Atlantic) at 3; Williams Petition (BellSouth) at 1-5; Williams Reply (BellSouth) at 1-2, 4 n.2, 5; MCI Petition (BellSouth) at 5; EDS Comments (BellSouth) at 3, 4; Williams Opposition (SWB) at 11; Williams Final Reply (SWB) at 1-2, 4 n.4; EDS Comments (SWB) at 3, 4; MCI Petition (SWB) at 4; EDS Comments (US West) at 3; MCI Petition (US West) at 4; CTI Comments (Information Submissions) at 7, 10; MCI Comments (Information Submissions) at 4 n.4.; ICA Reply Comments (Information Submissions) at 6, 10.

[141] In light of our conclusion that the BOCs have not sufficiently demonstrated that discontinuance of dark fiber service would not adversely affect the public interest, *see infra* ¶ ¶ 57-66, we do not think it necessary to address here the BOCs' argument that requiring continuation of dark fiber service interferes with their reasonable business discretion. *See* BellSouth Application at 8-9; SWB Application at 13; US West Application at 20.

[142] Bell Atlantic Application at 4; Bell Atlantic Information Submission at 2-4; BellSouth Information Submission, Attachment 1; BellSouth Reply Comments (Information Submission), Exhibit A; SWB Application at 11; SWB Reply at 6 n.7, 8; SWB Information Submission at 1-2; SWB Errata to Information Submission at 2; SWB Reply Comments (Information Submission) at 1; US West Application at 10-11; US West Information Submission, Errata Filing, Responses 3 and 4.

[143] *See, e.g.*, Williams Comments (Information Submissions) at 2, 5-7; EDS Comments (Information Submissions) at 5-6; MCI Comments (Information Submissions) at 3-4; ICA Reply Comments (Information Submissions) at 8.

[144] Bell Atlantic Reply Comments (Information Submisssions) at 1-2; BellSouth Reply Comments (Information Submission) at 4-5; SWB Reply Comments (Information Submission) at 13-14; US West Reply Comments (Information Submission) at 3-4.

[145] EDS Comments (Bell Atlantic) at 2, 4-5; Williams Petition (Bell Atlantic) at 7-8; Williams Reply (Bell Atlantic) at 5; MCI Petition (Bell Atlantic) at 4-5; Williams Petition (BellSouth) at 5-6, 9; Williams Reply (BellSouth) at 2, 5-6; MCI Petition (BellSouth) at 5-6; EDS Comments (BellSouth) at 3; Williams Opposition (SWB) at 12-13; Williams Final Reply (SWB) at 2, 9; MCI Petition (SWB) at 4-5; EDS Comments (SWB) at 3-4; MCI Petition (US West) at 4; EDS Comments (US West) at 3; CTI Comments (Information Submissions) at 8-10; Williams Comments (Information Submissions) at 2, 4-9, 46; EDS Comments (Information Submissions) at 3-7; MCI Comments (Information Submissions) at 2-4; ICA Reply Comments (Information Submissions) at 7-8.

[146] Bell Atlantic Application at 5, Appendix at A-4.

[147] *Id.* at 5, Appendix at A-3, A-4.

[148] *Id.* at 5 n.14. *E.g.*, municipalities; railroads, subway, and other transportation providers; cable television companies; and telephone companies. *Id.*

[149] *Id.* at 5 n.14.

[150] *Id.* at Appendix at A-3.

[151] *Id.* at 5 & n.15, Appendix at A-3.

[152] *Id.* at 5.

61. BellSouth asserts that alternatives to its dark fiber service include BellSouth's DS3 service, self-installation of dark fiber, or dark fiber from outside vendors.[153] In support of this assertion, BellSouth reprints from the "1991/1992 Fiber Optics Directory" a list of companies which BellSouth claims are located in BellSouth's territory and provide "fiber cables" and related services such as design, installation, and maintenance.[154]

62. SWB asserts that its DS1, DS3, and dim fiber access services are adequate substitutes for its dark fiber service;[155] that alternate "access services" are available from competitive access providers;[156] that self-construction of dark fiber facilities is an option;[157] and that many companies construct or otherwise provide dark fiber facilities.[158] In support of this last assertion, SWB submits a report summarizing the results of a survey conducted by an independent consultant to identify alternative providers of dark fiber. The study alleges that 19 companies construct fiber optic lines for customers.[159]

63. US West asserts that alternatives to its dark fiber service include self-provisioning of dark fiber;[160] construction of dark fiber facilities by outside contractors;[161] US West's other high capacity services;[162] digital microwave systems;[163] and possibly high capacity services from competitive access providers.[164] US West also provides an illustrative list of customers in its operating territory that have purchased dark fiber from non-US West sources.[165]

64. The BOCs' opponents dispute the BOCs' allegations. They aver that the BOCs' other existing tariffed offerings do not provide a feasible substitute for dark fiber service because: the rates for lit fiber service are substantially greater than those for dark fiber service; the dark fiber customer would no longer be able to provide and maintain its own terminating equipment, leading to a reduction in the quality of service it would be able to provide to its customers; and customer choice of fiber transmission rates and protocols would be limited to those the BOCs choose to provide, thereby restricting the user's flexibility to design, deploy, control, and maintain a fiber network that satisfies its unique communications needs. The opponents also maintain that self-construction of dark fiber facilities is not viable because without the BOCs' power of eminent domain, obtaining the necessary rights-of-way is costly, uncertain, and time consuming. In addition, they contend that access services from alternate fiber providers are not satisfactory because such services are presently concentrated in urban areas and thus do not provide ubiquitous access.[166] Williams and other opponents of the BOCs' discontinuance applications also dispute the accuracy of the study commissioned by SWB listing a number of firms that allegedly provide dark fiber service or facilities in SWB's region.[167]

65. As an initial matter, we find that the BOCs have failed to demonstrate that their other high capacity services, the "fiber-based" access services of their competitors, or digital microwave service are comparable substitutes for dark fiber service. The BOCs' opponents argue that dark fiber service permits customers to select the fiber transmission rates, protocols, and the terminating electronics that are compatible with their needs. In contrast, they continue, carrier-provided high capacity services limit customers to those digital protocols and fiber transmission rates required to create DS1 and DS3 channels within a fiber or microwave connection. The BOCs have not offered evidence that refutes this characterization of these high capacity services.

66. We next find that the BOCs have not demonstrated that adequate alternative sources of dark fiber service or facilities are available to the BOCs' dark fiber service customers within the BOCs' regions. Although the BOCs allege that companies operate within their regions that provide dark fiber, none has submitted persuasive evidence that these companies are capable of serving, or providing facilities suitable for use by, the BOCs' dark fiber service customers in the areas where these customers are located. Bell Atlantic, BellSouth, and US West make only unsubstantiated assertions regarding the presence of alternative providers within their respective regions as a whole, without any claim or evidence that these alternative providers can serve the particular areas served by these BOCs. While SWB presents a study in support of its assertion that alternative dark fiber providers exist in its region, the accuracy of that study has been challenged. Even taken at face value, the study fails to demonstrate that customers on a region-wide basis would not be harmed by discontinuance of SWB's dark fiber service. In sum, none of the BOCs' showings demonstrate with sufficient detail the existence of able and willing non-BOC

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153 BellSouth Application at 2-3, 8.

154 BellSouth *Ex Parte* letter dated December 22, 1992.

155 SWB Application at 11; SWB Reply at 7, 14; SWB Reply Comments (Information Submissions) at 5.

156 SWB Reply at 16; SWB Reply Comments (Information Submissions) at 5-6.

157 SWB Application at 12; SWB Reply at 20-21; SWB Reply Comments (Information Submissions) at 8-9.

158 SWB Reply at 18-20; SWB Reply Comments (Information Submissions) at 6-12, and Attachment 4 (Report on Sampling of Dark Fiber Providers) at 1-29.

159 SWB Reply Comments (Information Submissions), Attachment 4 (Report on Sampling of Dark Fiber Providers).

160 US West Application at 11-12.

161 *Id.* at 12. US West notes that it almost always uses outside contractors to lay dark fiber and that over 200 contractors are on its approved bid list to place fiber optic cable. *Id.* at 12 & n.37.

162 *Id.* at 12.

163 *Id.*

164 *Id.* at 13 n.38.

165 US West *Ex Parte* letter dated November 18, 1992.

166 Williams Petition (Bell Atlantic) at 8-9; Williams Reply (Bell Atlantic) at 3-4; Williams Petition (BellSouth) at 6-8; Williams Reply (BellSouth) at 4-5; MCI Petition (BellSouth) at 7-8; Williams Opposition (SWB) at 13-14; Williams Final Reply (SWB) at 3-4, 8; MCI Petition (SWB) at 4-5; MCI Petition (US West) at 4-5; Williams Comments (Information Submissions) at 5 n.2; MDC Comments (Information Submissions) at 2-4, Appendix at 1-2 ; ICA Reply Comments (Information Submissions) at 2-5, 8-9, 8 n.3; CTI Comments (Information Submissions) at 2, 7-8.

167 Williams, ICA, and MCI called the companies listed by SWB. They found that, of the companies they were able to successfully contact, most do not provide dark fiber service. They also found that the few companies that do provide dark fiber service either do not provide it in the geographic areas identified in SWB's study, or provide it only at geographically limited locations and do not consider themselves to be in competition with SWB in the provision of dark fiber service. Williams *Ex Parte* letter dated March 18, 1993.

providers of dark fiber service or facilities throughout their regions. In evaluating the reasonableness of such alternatives, we would also weigh a number of factors such as cost, deployment time frames, and availability of rights-of-way. We find that, on this record, the BOCs have failed to demonstrate the availability of reasonable alternatives to BOC-provided dark fiber service throughout their regions.[168]

IV. CONCLUSION

67. The Commission has carefully reviewed the Section 214 discontinuance applications filed by Bell Atlantic, BellSouth, SWB, and US West; the carriers' Information Submissions; and all other pleadings, comments, and *ex parte* filings filed in this proceeding. We conclude that dark fiber service is subject to our jurisdiction under Title II of the Communications Act because dark fiber service is "wire communication" offered by the BOCs on a common carrier basis. We also find that Section 214 authorization is required for termination of the BOCs' dark fiber service because such action would "discontinue, reduce, or impair service to a community." Finally, we conclude that Bell Atlantic, BellSouth, SWB, and US West have not met their burden of proof because they have failed to show that the public convenience and necessity will not be adversely affected by discontinuance of their dark fiber service on a region-wide basis. Accordingly, we deny their Section 214 discontinuance applications. This order does not prejudge our action on Section 214 applications that are more narrowly tailored to address the concerns raised herein.

V. ORDERING CLAUSES

68. Accordingly, IT IS ORDERED that the applications of the Bell Atlantic Telephone Companies, the BellSouth Telephone Companies, Southwestern Bell Telephone Company, and US West Communications, for discontinuance of dark fiber service pursuant to Section 214 of the Communications Act, ARE DENIED.

69. IT IS FURTHER ORDERED that all petitions to deny, oppositions, and comments filed against the Section 214 discontinuance applications ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

70. IT IS FURTHER ORDERED that SWB's Motion for Extension of Time to reply to the petitions to deny and the oppositions to its Section 214 discontinuance application filed on January 19, 1991, IS GRANTED, and that SWB's Reply filed on February 5, 1991, IS ACCEPTED.

71. IT IS FURTHER ORDERED that Williams' Motion for Extension of Time to reply to SWB's Reply filed on February 15, 1991, and Williams' Motion to Accept Late Filing of a Final Reply to SWB's Reply filed on February 22, 1991, ARE GRANTED, and that Williams' Final Reply filed on February 22, 1991, IS ACCEPTED.

72. IT IS FURTHER ORDERED that Williams' Motion to Accept Late Filing of its Reply to BellSouth's Opposition filed on May 30, 1991, IS GRANTED, and that Williams' Reply filed on the same date IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[168] Williams and other carrier customers also oppose discontinuance of the BOCs' dark fiber service to existing dark fiber customers because: (1) alternative services are more expensive; (2) discontinuance of dark fiber service will strand their investment in the equipment they have purchased to use with the dark fiber service they receive; and (3) they would incur high costs in moving their end users to new alternative facilities. *E.g.*, Williams Petition (Bell Atlantic) at 7-9; Williams Reply (Bell Atlantic) at 3-4, 9; MCI Petition (Bell Atlantic) at 5-6; Williams Petition (BellSouth) at 7-8; Williams Reply (BellSouth) at 4; MCI Petition (BellSouth) at 7-8; Williams Opposition (SWB) at 14; Williams Final Reply (SWB) at 3; MCI Petition (SWB) at 4-5; MCI Petition (US West) at 4-5; Williams Comments (Information Submissions) at 5 n.2; CTI Comments (Information Submissions) at 7-8. Bell Atlantic and BellSouth respond that additional expense for customers does not justify denial of a Section 214 application. Bell Atlantic Application at 4 n.11, 6 n.16; Bell Atlantic Opposition at 3 & n.11 (*citing ARINC*, 642 F.2d at 1233; *Western Union*, 74 FCC2d at 297; and *AT&T*, 4 FCC Rcd at 8582); BellSouth Opposition at 3-5 (*citing Western Union*, 74 FCC2d at 297, *citing TELPAK*, 64 FCC2d at 965); BellSouth Reply Comments (Information Submissions) at 6.

The cost of alternative services is one of a number of factors we weigh in a Section 214 discontinuance proceeding. We find that, in this proceeding, the BOCs have failed to demonstrate that reasonable alternatives are available in those areas where the BOCs' customers now obtain service. As for equipment bought for use with the BOCs' dark fiber service, it is possible that such equipment could be used with self- or contractor-constructed dark fiber facilities. Sale of the equipment is another possibility. Therefore, although a more narrowly tailored discontinuance application may nevertheless show an increase in customer costs, these costs can probably be mitigated to some extent.

APPENDIX A

List of Section 214 Applications and Responsive Pleadings

Bell Atlantic

1. Bell Atlantic Telephone Companies (Bell Atlantic), Application for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Facilities (Bell Atlantic Application), filed Feb. 13, 1991, amended Feb. 27, 1991.

2. Williams Telecommunications Group, Inc. (Williams), Petition to Deny of Williams Telecommunications Group, Inc. (Williams Petition (Bell Atlantic)), filed Mar. 22, 1991.

3. MCI Telecommunications Corporation (MCI), Petition to Deny (MCI Petition (Bell Atlantic)), filed Mar. 22, 1991.

4. EDS Corporation (EDS), Comments of EDS Corporation (EDS Comments (Bell Atlantic)), filed Mar. 22, 1991.

5. Bell Atlantic, Opposition of the Bell Atlantic Telephone Companies (Bell Atlantic Opposition), filed Apr. 5, 1991.

6. Williams, Reply to Opposition (Williams Reply (Bell Atlantic)), filed Apr. 17, 1991.

BellSouth

1. BellSouth Telephone Companies (BellSouth), Application (Under Protest) for Authority Pursuant to Section 214 of the Communications Act of 1934 To Cease Providing Dark Fiber Facilities (BellSouth Application), filed Mar. 1, 1991.

2. Williams, Petition to Deny (Williams Petition (BellSouth)), filed May 3, 1991.

3. MCI, Petition to Deny (MCI Petition (BellSouth)), filed May 3, 1991.

4. EDS, Comments of EDS Corporation (EDS Comments (BellSouth)), filed May 3, 1991.

5. BellSouth, Opposition (BellSouth Opposition), filed May 17, 1991.

6. BellSouth, Errata (BellSouth Errata), filed June 19, 1991.

7. Williams, Motion for Acceptance of Late-Filed Pleading (BellSouth), filed May 30, 1991.

8. Williams, Reply to Opposition of Williams Telecommunications Group, Inc. (Williams Reply (BellSouth)), filed May 30, 1991, amended May 31, 1991.

SWB

1. Southwestern Bell Telephone Company (SWB), Application (Under Protest) for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Specialized Dark Fiber Arrangements (SWB Application), File No. W-P-C-6670, filed Nov. 2, 1990.

2. Williams, Opposition of Williams Telecommunications Group, Inc. (Williams Opposition (SWB)), filed Jan. 11, 1991.

3. MCI, Petition to Deny (MCI Petition (SWB)), filed Jan. 14, 1991.

4. EDS, Comments of EDS Corporation (EDS Comments (SWB)), filed Jan. 11, 1991.

5. SWB, Motion for Extension of Time, filed Jan. 19, 1991.

6. SWB, Reply to Oppositions (SWB Reply), filed Feb. 5, 1991.

7. Williams, Motion for Extension of Time (SWB), filed Feb. 15, 1991.

8. Williams, Motion for Acceptance of Late-Filed Pleading (SWB), filed Feb. 22, 1991.

9. Williams, Final Reply of Williams Telecommunications Group, Inc. (Williams Final Reply (SWB)), filed Feb. 22, 1991.

US West

1. US West Communications (US West), Contingent Application Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Specialized Dark Fiber Arrangements (US West Application), File No. W-P-D-364, filed Dec. 14, 1990.

2. MCI, Petition to Deny (MCI Petition (US West)), filed Jan. 25, 1991.

3. EDS, Comments of EDS Corporation (EDS Comments (US West)), filed Jan. 25, 1991.

4. US West, Opposition (US West Opposition), filed Feb. 12, 1991.

APPENDIX B

List of Information Submissions and Responsive Pleadings

Information Submissions

1. Bell Atlantic, Information Submission [Public Version] (Bell Atlantic Information Submission), filed Sep. 11, 1991.

2. Bell Atlantic, Information Submission [Confidential Version], filed Sep. 11, 1991.

3. BellSouth, Information Submission [Public Version] (BellSouth Information Submission), filed Sep. 11, 1991.

4. BellSouth Information Submission [Confidential Version], filed Sep. 11, 1991.

5. SWB, Information Submission [Public Version] (SWB Information Submission), filed Sep. 11, 1991, amended Sep. 13, 1991.

6. SWB Information Submission [Confidential Version], filed Sep. 11, 1991.

7. U.S. Federal Communications Commission (FCC), Letter to US West, Request for *Ex Parte* Notice and Data Submission, dated May 6, 1991.

8. US West, Letter to FCC, Confidential Data Submission, dated May 13, 1991.

9. FCC, Letter to US West, Request for Clarification of Scope of Confidentiality for May 13, 1991, Data Submission, dated May 17, 1991.

10. US West, Letter to FCC, Clarification of Scope of Confidentiality for May 13, 1991, Data Submission, dated May 21, 1991.

11. US West, Response to Information Request [Public Version] (US West Information Submission), filed Sep. 11, 1991, amended Sep. 12, 1991.

12. US West, Response to Information Request [Confidential Version], filed Sep. 11, 1991, amended Sep. 12, 1991.

Comments

1. Williams, Consolidated Comments of Williams Telecommunications Group, Inc. (Williams Comments (Information Submissions)), filed Sep. 20, 1991.

2. MCI, MCI Telecommunications Corporation's Comments in Opposition to Information Request Responses (MCI Comments (Information Submissions)), filed Sep. 20, 1991.

3. EDS, Comments of EDS Corporation (EDS Comments (Information Submissions)), filed Sep. 20, 1991.

4. McDonnell Douglas Corporation (MDC), Comments of McDonnell Douglas Corporation (MDC Comments (Information Submissions)), filed Sep. 20, 1991.

5. Communications Transmission, Inc. (CTI), Comments of Communications Transmission, Inc. (CTI Comments (Information Submissions)), filed Sep. 20, 1991.

Reply Comments

1. Bell Atlantic, Reply Comments (Bell Atlantic Reply Comments (Information Submissions)), filed Sep. 27, 1991.

2. BellSouth, Reply Comments [Public Version] (BellSouth Reply Comments (Information Submissions)), filed Sep. 27, 1991.

3. BellSouth, Reply Comments [Confidential Version], filed Sep. 27, 1991.

4. SWB, Southwestern Bell Telephone Company's Reply (SWB Reply Comments (Information Submissions)), filed Sep. 27, 1991.

5. US West, Reply (US West Reply Comments (Information Submissions)), filed Sep. 27, 1991.

6. International Communications Association (ICA), Reply Comments of the International Communications Association, (ICA Reply Comments (Information Submissions)), filed Sep. 27, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-2
Phase I

In the Matter of

Filing and Review of Open
Network Architecture Plans

MEMORANDUM OPINION AND ORDER

Adopted: March 25, 1993; Released: March 29, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 21, 1991, the Commission adopted the *BOC ONA Further Amendment Order*, approving most of the Open Network Architecture (ONA) Plan further amendments and modifications of each of the Bell Operating Companies (BOCs), and requiring certain further amendments and annual reports.[1] In this Order, we approve the further amendments filed by the BOCs, establish an additional annual reporting requirement, and further clarify the password/ID requirement for BOC databases containing comprehensive customer proprietary network information (CPNI).[2]

II. BACKGROUND

2. In the *Computer III* proceeding, the Commission established a regulatory framework of nonstructural safeguards to govern the BOCs' participation in the enhanced services marketplace. In order to provide network-based opportunities for competing enhanced services providers (ESPs), the Commission imposed Comparably Efficient Interconnection (CEI) and ONA requirements as conditions for the provision of enhanced services on an integrated basis by the BOCs.[3] In the *Phase I Order*, the Commission articulated the principles underlying ONA, instructed the BOCs to work with ESPs and to file ONA plans consistent with these principles by February 1, 1988, and conditioned removal of existing structural separation requirements on approval and implementation of these plans.

3. In the *BOC ONA Order*, the Commission approved in part the ONA plans of each of the BOCs and addressed in detail the initial ONA plans filed by the BOCs.[4] In that order, the Commission directed each BOC to file amended ONA Plans on May 19, 1989.[5] In the *BOC ONA Amendment Order*, the Commission approved the BOCs' amended plans, subject to further modifications and amendments.[6] In the *BOC ONA Further Amendment Order*, the Commission restated its position that ONA is an evolutionary process, and that the approval of the ONA plans is a first step in that process. The Commission also stated that it would continue to oversee ONA development, and that it would, therefore, continue to monitor the evolution of ONA with periodic reports, further amendments, or other Commission actions. In that Order, the Commission required further amendments to the BOC ONA plans and established new annual reporting requirements in a number of areas.[7]

4. In response to the requirements of the *BOC ONA Further Amendment Order*, on February 14, 1992, each BOC filed two amendments (February Amendments) ad-

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[1] Filing and Review of Open Network Architecture Plans, CC Docket 88-2, Phase I, 6 FCC Rcd 7646 (1991) (*BOC ONA Further Amendment Order*), *pet. for review pending*, MCI Telecommunications Corp. v. FCC, No. 92-70189 (9th Cir. filed Feb. 19, 1992).

[2] Amendments were filed by Ameritech Operating Companies (Ameritech); Bell Atlantic Telephone Companies (Bell Atlantic); BellSouth Corporation, and BellSouth Telecommunications, Inc. (BellSouth); New York Telephone Company and New England Telephone and Telegraph Company (NYNEX); Pacific Bell and Nevada Bell (Pactel); Southwestern Bell Telephone Company (SWBT); and US West Communications, Inc. (US West). Parties filing comments and replies on issues discussed herein are listed in Appendix A.

[3] Amendment of Sections 64.702 of the Commission's Rules and Regulations, Computer III, CC Docket No. 85-229, Phase I, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *Phase I Order* and *Phase I Reconsideration Order vacated*, California v. FCC, 905 F. 2d 1217 (9th Cir. 1990) (*California*); Phase II, CC Docket No. 85-229, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *Phase II Order vacated* California v. FCC, 905 F.2d 1217 (9th Cir. 1990). Computer III Remand Proceeding, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990), (*ONA Remand Order*), *recon.* 7 FCC Rcd 909 (1992), *pets. for rev. pending*, California v. FCC, No. 90-70336, (9th Cir. filed July 5, 1990); *See* Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991), *pets. for recon. pending, pets. for rev. pending*, California v. FCC, No. 90-70083 (9th Cir. filed Feb. 14, 1992).

[4] Filing and Review of Open Network Architecture Plans, CC Docket 88-2, Phase I, 4 FCC Rcd 1 (1988) (*BOC ONA Order*), *recon.*, 5 FCC Rcd 3084 (1990) (*BOC ONA Reconsideration Order*), 5 FCC Rcd 3103 (1990) (*BOC ONA Amendment Order*), *Erratum*, 5 FCC Rcd 4045 (1990), *pets for review pending*, California v. FCC, No. 90-70336 (9th Cir. filed July 5, 1990), *recon.*, 8 FCC Rcd 97 (1993) (*BOC ONA Amendment Reconsideration Order*). In the *BOC ONA Order*, the Commission approved the common ONA model developed by the BOCs and Bell Communications Research, Inc. (Bellcore). Under this model, ESPs obtain access to various optional, unbundled ONA services, termed Basic Service Elements (BSEs), through access links described as Basic Serving Arrangements (BSAs). Other elements of the model include Complementary Network Services (CNSs), which are optional, unbundled basic service features that an end user may obtain from a carrier in order to receive or use an enhanced service, and Ancillary Network Services (ANSs), which are non-Title II services, such as billing and collection, which may be useful to ESPs. *BOC ONA Amendment Order*, 5 FCC Rcd at 3104, para. 4.

[5] *BOC ONA Order*, 4 FCC Rcd at 255-260, para. 496.

[6] *BOC ONA Amendment Order*, 5 FCC Rcd at 3104, para. 1, and 3120, para. 149.

[7] *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7647-8, para. 1.

dressing: (1) plans for the unbundling of Signaling System 7 (SS7), Integrated Services Digital Network (ISDN), and Intelligent Network (IN), and generally how these services will fit into the ONA framework; and (2) changes to its customer proprietary network information (CPNI) plan.[8] On April 15, 1992, each BOC filed the final two amendments (April Amendments) addressing: (1) changes in the BOCs' databases that are password/ID or otherwise restricted from access by BOC enhanced services marketing personnel to reflect the CPNI requirements adopted in the *BOC Safeguards Order;* and (2) additional CNSs that will be offered as BSEs.[9]

III. DISCUSSION

A. Unbundling New Technologies

5. In the *BOC ONA Further Amendment Order,* the Commission determined that the BOCs had not explained how they would unbundle the services provided through the new technologies of SS7, ISDN, and IN.[10] The Commission therefore required the BOCs to file a further one-time amendment describing the type of physical and/or tariff unbundling contemplated for SS7, ISDN, and IN. The Commission also asked the BOCs to explain generally how these services will fit into the ONA framework.[11]

6. In response to this requirement, the BOCs generally provide information on the services that could be provided through these technologies.[12] The majority of BOCs argue, however, that it is difficult to provide very specific information on the unbundling of the new technologies because these technologies are in early developmental stages.[13] Several BOCs state that they are uncertain as to exactly what unbundling information the Commission requires -- the unbundling of the services provided through these new technologies or the unbundling of the new technologies.[14] For example, BellSouth urges the Commission to make a "clear" distinction between "services" and "technologies."[15] The BOCs argue that the Commission has two ongoing proceedings examining unbundling issues.[16] The BOCs also argue that the Commission did not intend to require unbundling of new technologies in the ONA model.

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[8] On May 8, 1992, the Bureau released an order approving the BOCs' CPNI changes as proposed in their February amendments. *See* Filing and Review of Open Network Architecture Plans, CC Docket 88-2, Phase I, 7 FCC Rcd 2999 (1992).

[9] The *BOC ONA Further Amendment Order* also required the BOCs to provide the following annual reports on an ongoing basis beginning April 15, 1992: (1) three-year deployment projections of ONA services; (2) new ONA service requests and their disposition, and disposition of new service requests that have previously been designated for further evaluation; (3) treatment of ONA services previously deemed infeasible; (4) BSEs used in the provision of the BOCs' own enhanced services; (5) deployment of SS7, ISDN, and IN in terms of percentage of access lines served system-wide and on a market-area basis; (6) new ONA services available through SS7, ISDN, and IN, and plans to provide these services; (7) progress on technical and long-term uniformity; (8) progress on the provision of BOC operations support systems (OSS) services, and access to those services by ESPs; (9) progress on uniform provision of OSS services; and (10) the provision of billing information to ESPs. The BOCs were also required to file information on state and federal tariffing of BOC ONA services no later than March 31, 1992, and every six months thereafter. The BOCs were also required to file a copy of the *ONA Services User Guide,* along with the Appendices A, B, and C that were initially in the *Cross Reference Guide,* when the information is updated semi-annually. In addition, each BOC must file an amendment to its ONA plan prior to offering an enhanced service that uses a BSA, BSE, or CNS other than those listed in its approved ONA plan. *Id.* at 7677-9, Appendix B.

[10] Intelligent Network (IN) is a generic term that subsumes those circuit-switched voice/data networks that use the capabilities of decentralized logic modules (such as Service Control Points) to modify the behavior of a conventional digital, stored-program-controlled switch. AIN is the Bellcore version of one type of intelligent network. Three evolutionary stages of AIN have already been described in various Bellcore publications: Release 0, Release 1, and Release 2.

[11] *BOC ONA Further Amendment Order,* 6 FCC 7660 at para. 30, and 7677 at Appendix B, para. 1. The BOCs were also required to file an annual report on April 15, 1992, describing the new ONA services available through SS7, ISDN, and IN, and their plans to provide these services. *Id.* at 7660, para. 29, and 7678, (5).

[12] Ameritech, Bell Atlantic, NYNEX, Pactel, SWBT, and US West describe the types of services that could be provided through SS7. Ameritech February Amendment at 7-11; Bell Atlantic February Amendment at A-2-3; NYNEX February Amendment at 8-10; Pactel February Amendment at 7-10, SWBT February Amendment at 3-4, 11-2; and US West Amendment at 8. Ameritech, Bell Atlantic, NYNEX, Pactel, SWBT, and US West describe the services they will provide through ISDN. Ameritech February Amendment at 11-14, Bell Atlantic February Amendment at A-3-4; NYNEX February Amendment at 11-2, Pactel February Amendment at 11-2; SWBT February Amendment at 4-11; and US West February Amendment at 9-10. Ameritech, Bell Atlantic, and NYNEX state that it is difficult to provide information on IN since this technology is in the developmental stage. Ameritech February Amendment at 14-9, Bell Atlantic February Amendment at A-4, NYNEX February Amendment at 13. Ameritech, Pactel, and US West state that they are conducting technical trials on IN and that further deployment and development are dependent on the trials. Ameritech February Amendment at 15-7, Pactel February Amendment at 12-3, US West February Amendment at 10-11. Bell Atlantic states that it is developing IN in a manner that will allow ESPs to create new services using their own processors operating through Bell Atlantic's IN. Bell Atlantic February Amendment at A-4. Bell Atlantic, Pactel, SWBT, and US West state that they will provide further information on IN in their comments in the Commission's *Intelligent Networks* proceeding. Bell Atlantic February Amendment at A-5; Pactel February Amendment at 13; SWBT February Amendment at 12; and US West February Amendment at 11.

[13] Bell Atlantic February Amendment at A-2; BellSouth February Amendment at (i). 5-6; SWBT February Amendment at 2; US West February Amendment at ii; and NYNEX Reply at 7.

[14] BellSouth February Amendment at 7-8; SWBT February Amendment at 2, 12; and US West February Amendment at 7.

[15] BellSouth February Amendment at 7.

[16] For example, BellSouth believes that the Commission has not established criteria for unbundling of technology and that the *Intelligent Networks* and *Expanded Interconnection* proceedings will address this issue. *See* In the Matter of Intelligent Networks, Notice of Inquiry, CC Docket No. 91-346, 6 FCC Rcd 7254 (1991) (*Intelligent Networks),* and In the Matter of Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, CC Docket Nos. 91-141 and 92-222, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection).*

7. Allnet, ITAA, and MCI filed comments on the BOCs' February Amendments.[17] MCI states that the BOCs have failed to comply with the requirement to address both the manner in which SS7, ISDN, and IN will be unbundled and how the services provided through these technologies will be unbundled since they only describe how services will be unbundled and do not address the unbundling of technologies.[18] MCI argues that it would be pointless for the Commission to require the BOCs to address this requirement again.[19] MCI strongly argues that the Commission should "immediately" require the BOCs to completely unbundle network features.[20]

8. Allnet states that the BOCs do not provide specific unbundling proposals. Allnet argues that if ONA unbundling is not accomplished along lines that are technologically based, true unbundling does not take place.[21] Allnet states that the ONA rules should allow free design and use of the local network by competitive network intelligence providers. Allnet urges the Commission to initiate a new proceeding that will define minimal rules for protecting against harm to third-parties in an IN equal access environment or merge this proceeding into the *Intelligent Networks* proceeding.[22]

9. In response to MCI's comments, the majority of BOCs argue that MCI does not raise any new arguments.[23] Ameritech argues that MCI chooses to ignore the detailed information on SS7 and ISDN that Ameritech provided in its February Amendment.[24] Bell Atlantic, Pactel, SWBT, and US West argue that the Commission did not require the BOCs to unbundle technology.[25] NYNEX states that the Commission recognizes the difficulty in reporting on services based on new technologies where standards have not been defined.[26] Ameritech, NYNEX, and SWBT dismiss Allnet's proposal for combining the ONA and *Intelligent Networks* proceedings since the issues have already been addressed.[27] NYNEX, Pactel, and US West claim that they have provided all of the information that they are able to provide at this time.[28]

10. The Commission has not yet required the level of unbundling requested by the commenters. The Commission has, however, required that the BOCs provide information on their progress in unbundling these new technologies.[29] The BOCs may choose to unbundle technologies as part of their own network planning or in response to the requests of ESPs. In addition, the BOCs may be required to unbundle as a result of Commission requirements established in other proceedings, such as the *Intelligent Networks* and *Expanded Interconnection* proceedings. We agree with MCI that a further amendment on this issue will not result in additional information at this time. Instead, we intend to continue monitoring the BOCs' progress in this area by requiring the BOCs to report annually on the unbundling of new technologies arising from their own initiative, in response to requests by ESPs, or resulting from requirements imposed by the Commission.[30] Each BOC must file the first annual report on the unbundling of new technologies by July 15, 1993. Thereafter, each BOC must file this annual report by April 15 of each year with other annual reports required by the *BOC ONA Further Amendment Order*.

B. Reclassification of Services

11. In the *BOC ONA Further Amendment Order*, the Commission required the BOCs to amend their ONA plans to list CNSs that should also be BSEs based on a review of the ONA service classifications used by other BOCs, and the potential use of ONA services by ESPs. The Commission established this requirement in an attempt to achieve greater uniformity in the BOCs' classifications of ONA services. Although the Commission does not require strict uniformity in the classifications of ONA services, it believes that greater uniformity would advance the objectives of ONA.[31]

12. All of the BOCs filed an amendment on this issue, but none of the BOCs reclassify any CNSs as BSEs, although several reclassify BSEs as CNSs.[32] The BOCs state that they have reviewed the ONA plans of the other

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[17] ITAA argues that the BOCs will not offer certain unbundled ONA services without a demand for these services, and the services will not materialize unless the Commission changes its ONA pricing rules. ITAA Comments at 1. Bell Atlantic, NYNEX, Pactel, and SWBT argue that ITAA's argument is irrelevant since the Commission has already decided the issue of ONA pricing. Bell Atlantic Reply at 1; NYNEX Reply at 5; Pactel Reply at vi; and SWBT Reply at 7. This issue was addressed in the *ONA/Part 69* proceeding and will not be addressed again here. *See* In the Matter of Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 89-79, 6 FCC Rcd 4524 (*ONA/Part 69 Order), recon. pending.*

[18] MCI states that Bell Atlantic and NYNEX "nominally" address the requirement of physical unbundling but fall short on network unbundling. MCI Comments at 2-4.

[19] MCI Comments at 7.

[20] *Id. See also* MCI Supplemental Comments at 7-8.

[21] Allnet Comments at 1-2.

[22] *Id.* at 3.

[23] Ameritech Reply at 3; Bell Atlantic Reply at 1; NYNEX Reply at 2-3; Pactel Reply at 7; and SWBT Reply at 3.

[24] Ameritech Reply at 2.

[25] Bell Atlantic Reply at 3; Pactel Reply at 8; SWBT Reply at 3; and US West Reply at 2-3.

[26] NYNEX Reply at 7, n.13.

[27] Ameritech Reply at 3; NYNEX Reply at 7; and SWBT Reply at 8.

[28] NYNEX Reply at 6; Pactel Reply at 2, 5-6; and US West Reply at 2.

[29] In both the *BOC ONA Amendment Order* and the *BOC ONA Further Amendment Order*, the Commission directed the BOCs to describe, in significantly greater detail than previously reported in their 1991 Amendments, their specific plans for developing and implementing SS7, ISDN, and IN technologies, including a description of how they will unbundle these technologies and generally how these technologies will fit into the ONA framework. *See BOC ONA Amendment Order*, 5 FCC Rcd at 3116, para. 111; and *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7660, para. 30.

[30] As Allnet states, the Commission is examining the issue of unbundling in the *Intelligent Networks* proceeding. Allnet Comments at 1.

[31] *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7673, para 59.

[32] Ameritech April Amendment at 4; Bell Atlantic April Amendment at A-2; BellSouth April Amendment at 3-5; NYNEX April Amendment at 4-5; Pactel April Amendment at 2-5; SWBT April Amendment at 3-4; and US West April Amendment at 6-7. NYNEX received a waiver to reclassify

BOCs and have determined that their services are properly classified in accordance with the Commission's classification criteria and the potential use of the service by ESPs. The BOCs argue that the distinction between a CNS and a BSE is determined by the identity of the user of the service.[33] The BOCs state that no reclassifications are warranted at this time.

13. Bell Atlantic states that to date it has received no requests from ESPs for CNSs.[34] BellSouth states that it has identified five ONA capabilities that it classifies as CNSs although these services are classified as BSEs by other BOCs.[35] NYNEX states that it has identified several services in its initial plan that were classified as CNS/BSEs, and that it has amended its ONA plan to reclassify the services as CNSs.[36]

14. Pactel states that it supports the Commission's interest in greater uniformity, but that there is no one right or wrong classification. Pactel argues that the use and the timing of the demand for a particular service may vary from region to region, producing different classifications among the BOCs.[37] Pactel argues that if a service meets the characteristics of both a CNS and a BSE the service does not have to be federally tariffed if the sole use as a BSE is on a local exchange BSA.[38] SWBT states that it has not received any requests from ESPs to reclassify CNSs as BSEs.[39] US West states that, in reviewing the other BOC plans, it is impressed by the existing high degree of uniformity already demonstrated by those plans.[40]

15. MCI was the only party that filed comments addressing this issue. MCI argues that the BOCs' reevaluations of their ONA services are based "solely" on a comparison of the other BOCs' tariffs. MCI states that it was the Commission's intent to require the BOCs to reevaluate the use which might be made of CNSs by ESPs. MCI notes that BellSouth has five CNSs that could be BSEs, but that BellSouth has declined to reclassify these services. MCI urges the Commission to require the BOCs to perform a serious evaluation of the "use" which ESPs might make of such services.[41]

16. In addition to the BOCs' amendments and the comments on reclassification of ONA services, the National Association of Regulatory Utility Commissioners (NARUC) filed a petition concerning the issue of CNS reclassification.[42] NARUC argues that when the Commission established this amendment, the Commission changed the definition of CNSs. NARUC argues that the new definition is broad and vague and "unlawfully" encroaches upon the jurisdiction reserved to the states under the dual regulatory scheme established by the Communications Act.[43] Six parties filed comments in response to NARUC's petition.[44] AT&T, MCI, and ITAA oppose NARUC's petition, arguing that the Commission did not modify the definition of CNSs. In support of NARUC's petition, DC PSC, GTE, and Missouri PSC argue that the definition of CNS is confusing and that the Commission should clearly define a CNS.

17. We agree with Pactel that the use and the timing of the demand for a particular service may vary from region to region, thereby producing different classifications among the BOCs. Thus, we find that the BOCs' amendments on this issue satisfy the Commission's requirements. In establishing these requirements, the Commission was striving to achieve greater uniformity among the ONA services classifications. It was not the Commission's intent to require the BOCs to evaluate each ONA service at the level proposed by MCI. In addition, contrary to NARUC's position, the Commission did not change the definition of a CNS in the *BOC ONA Further*

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several BSEs as CNSs. *See infra* n.36. Pactel filed for a waiver that proposes to reclassify several BSEs as CNSs. *See infra* n.37. In addition, Ameritech states in its February Amendment that it proposes to reclassify eight ISDN services from BSEs to CNSs because there is no demand for the services by ESPs. Ameritech February Amendment at 12. The BOCs are not permitted to change the classification of ONA services without Commission approval if they have committed to offer the services as BSEs in their ONA plans. To reclassify these ONA services, the BOC must file a petition for waiver requesting such a change. We therefore reject Ameritech's proposed change in the classification of its eight ISDN services. Absent waivers, the BOCs are required to tariff federally all BSEs listed in their amended ONA plans. *See BOC ONA Further Amendment Order*, 6 FCC Rcd at 7653-4, para. 10.

[33] Ameritech April Amendment at 4; Pactel April Amendment at 2-5; and SWBT April Amendment at 3-4.

[34] Bell Atlantic April Amendment at A-2.

[35] BellSouth describes the five capabilities as: Call Forwarding with Call Screening; Derived Local Channels; Screening; Access to Data Services; and Warm Line. BellSouth states that of the five capabilities, only two are treated as something other than a CNS by more than one BOC. (For example, Derived Local Channel, which provides a customer with a connection to the central office via a low speed derived channel, is classified as a CNS and BSE by Pactel; NYNEX classifies it as a BSA; Bell Atlantic classifies the capability as a CNS and a BSA; and US West classifies it as a CNS. BellSouth April Amendment at 3-5.

[36] NYNEX states that several services, initially identified as CNSs/BSEs, have been reclassified as CNSs in its ONA plan in light of the Commission's ONA pricing rules. NYNEX identifies the services as: Call Forwarding; Speed Calling; Call Waiting; Cancel Call Waiting; Remote Access to Call Forwarding Variable; Call Forwarding Busy/Don't Answer; Call Forwarding Variable Ring Counts; and Call Forwarding Override. NYNEX April Amendment at 5. NYNEX filed a waiver seeking Commission approval to reclassify these ONA services as CNSs, and the Commission approved NYNEX's waiver. *See* In the Matter of Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture and the Filing and Review of Open Network Architecture Plans, CC Docket Nos. 89-79 and 88-2, Memorandum Opinion and Order, 7 FCC Rcd 7241 (1992).

[37] Pactel states that three of its services classified as BSE/CNSs also meet the characteristics of CNSs. Pactel describes the three services as Selective Call Forwarding, Selective Call Rejection, and Automatic Call Back. Pactel does not believe that these services should be classified as BSEs. Pactel states that Selective Call Forwarding and Selective Call Rejection are classified as CNSs by the other BOCs; Automatic Call Back is offered by all BOCs as a CNS, but only NYNEX classified it as a CNS or BSE. Pactel states that it intends to reclassify these three services as CNSs. On November 23, 1992, Pactel filed a petition requesting a waiver to reclassify the three ONA services as CNSs. Pactel April Amendment at 2-5. *See supra* n.32.

[38] Pactel April Amendment at 2-5.

[39] SWBT April Amendment at 3-4.

[40] US West April Amendment at 6-7 and note 23.

[41] MCI Comments at 4, 7-8.

[42] On April 15, 1992, NARUC filed an opposition, motion for declaratory ruling, clarification and/or informal Commission action concerning complementary network services (NARUC petition).

[43] NARUC Petition at 6.

[44] Parties filing comments on the NARUC petition include AT&T, DC PSC, GTE, ITAA, MCI, and Missouri PSC.

Amendment Order.[45] A CNS and a BSE often are functionally indistinguishable. The classification of a feature as a CNS or a BSE simply depends on the identity of the local exchange carrier customer -- end users take CNSs, while ESPs use BSEs.[46] In the *BOC ONA Order*, the Commission decided not to prohibit the use of the CNS classification as long as the BOCs did not discriminate in the delivery of CNSs to ESPs.[47] In their amendments, several BOCs state that they have not received any requests from ESPs for CNSs.[48] We intend, however, to continue monitoring the BOCs' classification of services through the semi-annual report on tariffed ONA services which the BOCs file pursuant to the *BOC ONA Further Amendment Order*.[49]

C. Procedures for Restricting BOC Access to CPNI

18. Under the ONA rules, enhanced services marketing personnel are not permitted to have access to restricted CPNI. The BOCs' ONA plans have included procedures for implementing this rule, including password/ID protection for some of the BOCs' internal databases. The *BOC ONA Amendment Order* found the BOCs' proposals to implement password/ID systems or prevent logon access to their major marketing support databases adequate. It also found that the BOCs vary in their treatment of certain auxiliary databases that are not routinely accessed by enhanced services marketing personnel and contain fragmented CPNI. The Commission concluded that these auxiliary databases are of little value to marketing personnel for sales activities. Thus, the *BOC ONA Amendment Order* required the BOCs to apply password/ID systems to all primary databases that are routinely accessed by the BOCs' enhanced services marketing personnel and contain 1 comprehensive CPNI. The Commission did not require that the BOCs implement password/ID systems for auxiliary databases that contain fragmented CPNI and are not routinely accessed by enhanced services personnel.[50] In addition, the Commission found variation in the databases that the BOCs proposed to protect with password/ID systems. To ensure greater consistency in defining the databases that must be subject to such restrictions, the Commission required the BOCs to submit more specific information about their databases in their 1991 Amendments.

19. In the *BOC ONA Further Amendment Order*, the Commission found that the BOCs appeared to have made progress in applying password/ID security or limiting access to databases containing comprehensive CPNI pursuant to the requirements of the *BOC ONA Amendment Order*.[51] The Commission noted, however, that certain parties had expressed concern about the application of password/ID systems to BOC databases. Because the *BOC Safeguards Order* modified the CPNI rules, the Commission required each BOC to submit a further amendment describing any changes resulting from the modified CPNI requirement on the BOC databases that are password/ID protected or otherwise restricted from access by BOC enhanced services marketing personnel.[52] The Commission also combined the record on this issue developed for the *BOC ONA Further Amendment Order* with the record developed in response to the April 1992 Amendments.[53]

20. In their 1991 Amendments, the BOCs reported that they have implemented a variety of means to restrict access to restricted CPNI by their enhanced services marketing personnel. They have placed password/ID restrictions on many of their primary files containing CPNI and have also implemented other means of limiting access which accomplish the same function as implementing password/ID systems. For instance, BOCs forbid access to the files, place the files under the control of an administrator who controls access to the database, or remove the restricted CPNI from the database altogether.[54]

21. In the April 1992 Amendments, most of the BOCs report that the change in the CPNI rules did not require a change in the databases that are password/ID protected because the BOCs had already denied access to such databases as a result of the previous CPNI requirements.[55]

22. Parties did not comment on this issue in response to the BOCs' April 1992 Amendments. In response to the BOCs' 1991 Amendments, however, AICC, the ONA Users Group, and ANPA argued that the BOCs do not uniformly apply password/ID systems to databases.[56] They argued that the BOCs should apply password/ID systems to databases with similar functions, such as service order processing. In addition, AICC argued that the Commission should review BOC auxiliary files for consistent treatment, and require the BOCs to eliminate CPNI in supplemental locations such as minicomputers accessible to enhanced services personnel.[57] The ONA Users Group and ANPA also argued that BOC enhanced services personnel should not have access to marketing databases that contain CPNI.[58]

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[45] Since the Commission did not change the definition of a CNS, we deny NARUC's petition.

[46] CNSs are tariffed at the state level and BSEs are tariffed at the state and federal level. *See BOC ONA Reconsideration Order*, 5 FCC Rcd at 3088-90, paras. 37-49.

[47] *BOC ONA Order*, 4 FCC Rcd at 47-8.

[48] Bell Atlantic April Amendment at A-2; SWBT April Amendment at 3-4; and US West April Amendment at 9.

[49] *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7664, para. 38, and 7678 at Appendix B.

[50] *BOC ONA Amendment Order*, 5 FCC Rcd at 3119, para. 136-7, 3120-1, para. 149 (B 11).

[51] *Id.*

[52] The modified CPNI rules deny BOC personnel involved in enhanced services marketing access to the CPNI of customers having more than twenty lines unless the customer has granted prior authorization. *See BOC Safeguards Order*, 6 FCC Rcd at 7571.

[53] *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7671, para 54 and n.93.

[54] *See BOC ONA Further Amendment Order*, Appendix L for information on databases identified by the BOCs in their 1991 ONA Further Amendments. *Id.* at 6 FCC Rcd 7695-6.

[55] *See e.g.*, BellSouth April Amendment at 2, SWBT April Amendment at 2, US West April Amendment at 5. Ameritech provides a listing of the databases that are password/ID protected. Ameritech April Amendment at Attachment 1.

[56] AICC Comments at 32-33; ONA Users Group Comments at 5-7; American Newspaper Publishers Association (ANPA) Reply at 7.

[57] AICC Comments at 32-3, 36-7. AICC argued further that BOC marketing personnel should not be allowed to extract CPNI information from databases. *Id.* at 38-9.

[58] ONA Users Group Comments at 7-8; ANPA Reply at 7.

23. The BOCs argued in their responses to the comments on their 1991 Amendments that, uniformity in, and further application of, password/ID systems to their databases are unnecessary.[59] Pactel noted that its minicomputers can only be accessed with a security code. NYNEX stated that it surveyed all CPNI databases, including those on minicomputers, to which marketing personnel have access for enhanced services. SWBT stated that enhanced services personnel do not have direct access to marketing department databases containing CPNI, and can only obtain information consistent with CPNI rules. Bell Atlantic stated that databases containing restricted CPNI are password/ID protected wherever they are located.

24. We have reviewed the BOCs' Amendments on password/ID systems filed in 1991 and April 1992 in light of the arguments made by commenters, the Commission's password/ID requirements, and the effect of the Commission's revisions of the CPNI rules. As the Commission concluded in the *BOC ONA Amendment Order*, it is clear from the record that there is a large variation in the types of databases used in the BOCs' operations. In addition, similar databases are used differently by different BOCs in their operations. We agree with the BOCs that strict uniformity in the application of password/ID systems as requested by the commenters is not necessary. We find, however, that certain primary databases containing comprehensive CPNI that are regularly accessed by enhanced services marketing personnel must be password/ID protected in order to meet the Commission's requirements of safeguarding restricted CPNI.[60] These databases, with a variety of names, are the major BOC support databases used to perform service order processing, marketing, and billing. These databases contain comprehensive customer information and records, such as customer profiles, customer calling patterns, and customer network services.[61]

25. We find, however, that password/ID systems need not be applied to primary databases that are used in provisioning and maintaining the network, such as maintenance or circuit and trunk tracking systems. These databases, like the auxiliary databases excluded from the password/ID requirement by the *BOC ONA Amendment Order*, contain fragmented CPNI that is not in a form useful to enhanced services marketing personnel for sales activities.[62] We also find that password/ID systems are not necessary for historical databases, because they are not regularly accessed by enhanced services marketing personnel.[63] If a BOC does not password/ID restrict these databases, however, it must provide training and establish procedures to ensure that marketing personnel do not have access to restricted CPNI from these databases for marketing purposes.

26. Finally, databases specifically developed to facilitate the marketing of enhanced services should be password/ID restricted if they contain restricted CPNI. This requirement is even more important because with the Commission's change to the CPNI rules, more records will likely be restricted.

D. OSS

27. The *BOC ONA Amendment Order* concluded that continuing development of OSS capabilities appears to be quite important to the kinds of services ESPs can provide, and required the BOCs to update information on their OSS services.[64] The *BOC ONA Further Amendment Order* found that although all of the BOCs plan to offer indirect access to some OSS services, several BOCs had not made substantial progress in providing OSS services to ESPs. The Commission stated that the plans of those BOCs would be reviewed with a heightened level of scrutiny.[65] In addition, the *BOC ONA Amendment Reconsideration Order* stated that, for those ONA services that BOCs provide through a gateway or by another means of mediated access, the BOCs should work with ESPs to determine ESP needs and demand for access to their customers' accounts and to enable ESPs to satisfy these needs by means of a secure access. The BOCs are required to work to achieve these goals through the Information Industry Liaison Committee (IILC) and report on their progress.[66]

28. AICC states that the BOCs have shown "continued foot-dragging" in providing ESPs access to OSS services. AICC states that several BOCs have withdrawn previous gateway systems and now either indicate they are doing market research or that they do not know what ESPs need.[67] AICC argues that the Commission should require those carriers that have not developed gateways "to pro-

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[59] Pactel Reply at 19-21 and n.7; NYNEX Reply at 18; SWBT Reply at 11-2, n.33; Bell Atlantic Reply at 4-5; BellSouth Reply at 7-11.

[60] To comply with this requirement BOCS may: apply password/ID systems; forbid access; place the database under the control of an administrator who controls access to the database; or remove the CPNI from the database altogether.

[61] We do not require password/ID protection for databases containing fragmented CPNI not easily accessed by marketing personnel for marketing enhanced services such as the PREMIS Information System (PREMIS), and BellSouth's service order status temporary database, Service Order Communications System (SOCS).

[62] This exclusion from the password/ID requirement includes, but is not limited to, the Loop Maintenance Operation System (LMOS), Trunk Integrated Recordkeeping System (TIRKS) and Circuit Installation and Maintenance Package (CIMAP), Central Office Equipment Assignment (COSMOS), and Facility Assignment & Control System (FACS).

[63] A password/ID system is not required, for example, for the US West historical database, Business Office Archive Retrieval System (BOARS).

[64] *BOC ONA Amendment Order*, 5 FCC Rcd at 3108, para. 38, 3120-1, para. 149 (B 3). Pursuant to the *BOC ONA Amendment Order*, the BOCs' enhanced services operations must continue to take the same access to OSS services as the BOCs provide to other ESPs, once structural separation requirements are lifted, until the BOCs can show that indirect access is comparably efficient to direct access. *Id.* at para. 43. The *BOC ONA Reconsideration Order* defined four OSS services as ONA services: (1) service order entry and status; (2) trouble reporting and status; (3) diagnostics, monitoring, testing, and network reconfiguration; and (4) traffic data collection. 5 FCC Rcd at 3087, para. 26.

[65] *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7668-9, para. 47.

[66] *BOC ONA Amendment Reconsideration Order*, 8 FCC Rcd 97 (1993).

[67] AICC Comments at 4. AICC also comments on the BOC provision to its own and competitive enhanced service providers of same access to OSS required by the *BOC ONA Amendment Order*. These issues were addressed in the *BOC ONA Amendment Reconsideration Order* and will not be addressed in this Order.

vide firm proposals and reasonable timetables" for developing effective access for ESPs to the four ONA OSS services.[68]

29. In their 1992 ONA Annual Reports, the BOCs report varied levels of progress in providing ESPs access to OSS. SWBT states that it has developed a new system that will be operational in the first Quarter of 1993. The new system will permit ESPs access to: service order entry for selected ONA services; service order inquiry for switched and special services; billing inquiry on exchange and access billing information; trouble entry for switched and special services; trouble status/inquiry for switched and special services; view trouble history for switched and special services; initiate tests on line-oriented services; and view traffic studies.[69] ESPs that want to order BSEs and BSAs can use SWBT's Exchange Carrier Tracking System (EXACT).[70]

30. Bell Atlantic states that after a four-year effort to make available a broad-based OSS gateway capability, it concluded that it was economically and technically infeasible.[71] Bell Atlantic does not report that it is providing ESPs with any access to OSS systems at this time.[72] Ameritech reports that it is currently offering Exact PC, which allows mechanical production and batch transmission of industry standard Access Service Requests (ASR); ORDERMATE, a high volume CNS ordering system; Rapid Order System for ordering some CNSs; Optinet Reconfiguration Service for reconfiguring DSOs within DS1s; and a line traffic measurement system for Centrex and PBX customers.[73]

31. NYNEX states that it provides automatic service order provisioning and status capabilities through ASR for access customers, and through Paperless Remote Order Entry System (PROES) for Centrex customers of New England Telephone. According to NYNEX, it has developed two systems for trouble reporting, Electronic Referral for Interexchange Carriers (ERIC) for access customers served by New York Telephone, and Seamless Integrated Management System (SIMS) for non-access customers served by New England Telephone.[74] NYNEX states that it plans to expand the PROES service order entry system to other exchange services such as private line services.[75] NYNEX states that New England Telephone is currently testing a Network Services Management System (NSMS) that allows customers to interact with certain OSSs to manage network services ordered from NYNEX. NYNEX states that these capabilities include real time network surveillance, traffic report generation, and interface with service order entry and trouble reporting systems.[76]

32. Pactel states that it provides service order and status, trouble reporting and status, testing, and network reconfiguration through gateways, such as Service Manager and Customer's Enhanced System for Access Requests (CESAR), or as a stand-alone service. Pactel states that although few small users traditionally use Service Manager, it is available to ESPs.[77] Pactel also states that it has developed a Bulk Third Party Service Ordering capability through CESAR for CNSs that are billed to ESPs.[78]

33. US West states that it is developing a new MEDIACC gateway and that it is currently developing the network interface specifications for public disclosure. MEDIACC's initial applications will be limited to trouble reporting and DS1/DS3 provisioning.[79] In the meantime, US West states, it has deployed the following individual services: Trouble Resolution for Access Circuits (TRACIR); Self Healing Network Service (SHNS); and Centrex Customer Rearrangement Service (CCRS).

34. BellSouth provides access to a number of OSS services through Administrative Management Service and FlexServe, including: network monitoring; testing and reconfiguration; trouble reporting and status; service order entry; administrative reports on service usage; and miscellaneous messaging to telco locations. BellSouth states that it has added product and service information, Preferred Interexchange Carrier (PIC) Inquiry and Order, access service order status, and access billing information. BellSouth is evaluating the addition of network usage information (network accounting and traffic data) and Performance and Fault Measurement Service capabilities.[80] BellSouth and US West argue that the Commission did not request comment on OSS issues and therefore the AICC comments on OSS should not be considered.[81]

35. Our review of the 1992 BOC ONA Annual Reports indicates continuing progress by the BOCs in providing access to OSS services. We find that SWBT, Pactel, and BellSouth have made substantial progress in providing OSS services to ESPs. We do not find, however, that the same progress has been made by Ameritech, NYNEX, US WEST, and Bell Atlantic. The Commission, in the *BOC ONA Amendment Reconsideration Order*, affirmed the importance of providing ESPs with access to OSS not only for the BSAs and BSEs needed by an ESP to provide enhanced services, but also to enable ESPs to request CNSs for their customers. In that Order, the Commission required each BOC to file an amendment to its ONA plan detailing its efforts toward providing ESPs access to OSS services to order CNSs for their customers.[82] In addition, the BOCs must report annually on their progress on the provisioning of BOC OSS services and ESP access to those services.[83] We will continue to monitor closely the progress of the BOCs in providing ESPs with access to BOC OSS services.

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[68] AICC Comments at 16.
[69] SWBT 1992 ONA Annual Report at 13-4.
[70] SWBT Reply Comments at 5, n.19.
[71] Bell Atlantic 1992 ONA Annual Report at A-10-11; Bell Atlantic Reply Comments at 2.
[72] Bell Atlantic 1992 ONA Annual Report at A-10-11.
[73] Ameritech 1992 ONA Annual Report at Attachment 9.
[74] SIMS also provides circuit testing capabilities.
[75] NYNEX 1992 ONA Annual Report at 22-28; NYNEX Reply at 4.
[76] NYNEX 1992 ONA Annual Report at 27.
[77] Pactel Reply at 5, 31. Pactel states that Nevada Bell does not have a service such as Service Manager because there has not been sufficient demand.
[78] Pactel 1992 ONA Annual Report at 32.
[79] US West 1992 ONA Annual Report at 29-30.
[80] BellSouth 1992 ONA Annual Report at Report 8.
[81] BellSouth Reply at 4-5 & n.5; US West Reply at 3, n.7.
[82] *BOC ONA Amendment Reconsideration Order*, 8 FCC Rcd 97 (1993).
[83] *BOC ONA Further Amendment Order* at 6 FCC Rcd at 7677-9, Appendix B.

E. Other Issues

36. In response to the BOC deployment plans presented in the BOCs' 1992 ONA Annual Reports, AICC contends that the BOCs are not providing several services needed by the alarm service providers. Those services are derived local channels, network reconfiguration, route diversity, loop break detection, one-way alarm transmission, and broadband links for video transmission. The BOCs respond that the services are available, are under development, are not technically feasible, require standards, or lack demand. Based on the record before us, we do not find that the BOCs have not complied with the ONA requirements regarding these services. If AICC is not satisfied with the responses received from the BOCs, it can file a petition for declaratory ruling, following the procedure outlined by the Commission in the *BOC ONA Further Amendment Order*.[84]

37. MCI filed supplemental comments on the BOCs' 1992 ONA Annual Reports. MCI states that it is still dissatisfied with the BOC implementation of ONA. MCI also presents general assessments of BOC reports regarding new ONA service requests and ONA services previously deemed infeasible.[85] In its supplemental comments, MCI does not raise any issues that have not been addressed previously in ONA orders. If MCI is not satisfied with the responses received from the BOCs regarding a service it requires as an ESP, like AICC, it can file a petition for declaratory ruling, following the procedure outlined by the Commission in the *BOC ONA Further Amendment Order*.

IV. ORDERING CLAUSES

38. ACCORDINGLY, pursuant to the authority contained in Section 0.91 of the Commission's rules, IT IS HEREBY ORDERED, that the ONA Plan Second Further Amendments of Ameritech, Bell Atlantic, BellSouth, NYNEX, Pactel, SWBT, and US West ARE APPROVED, subject to the conditions described herein.

39. IT IS FURTHER ORDERED that NARUC's petition, as described herein, IS DENIED.

40. IT IS FURTHER ORDERED that the BOCs must provide the reports as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

APPENDIX A

Parties Filing Comments on February 14, 1992 Amendments

Allnet Communications Services, Inc. (Allnet)

Information Technology Association of America (ITAA)

MCI Telecommunications Corporation (MCI)

Parties Filing Replies on February 14, 1992 Amendments

Ameritech

Bell Atlantic

NYNEX

Pactel

SWBT

US West

Parties Filing Comments on April 15, 1992 Amendments

Alarm Industry Communications Committee (AICC)

MCI

Parties Filing Comments on NARUC Petition

American Telephone and Telegraph Company (AT&T)

ITAA

Public Service Commission of the District of Columbia (DC PSC)

GTE Service Corporation (GTE)

MCI

Missouri Public Service Commission (Missouri PSC)

Parties Filing Replies on April 15, 1992 Amendments and NARUC Petition

Ameritech

BellSouth

Bell Atlantic

NYNEX

Pactel

SWBT

US West

Supplemental Comments of December 17, 1992

MCI

[84] *See BOC ONA Further Amendment Order*, 6 FCC Rcd at 7654, para. 11.

[85] MCI Supplemental Comments at 3-6.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-26

In the Matter of

Amendment of Rules Governing
Procedures to Be Followed When
Formal Complaints Are Filed Against
Common Carriers

REPORT AND ORDER
(PROCEEDING TERMINATED)

Adopted March 2, 1993; Released April 2, 1993

By the Commission:

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I. INTRODUCTION

1. On March 12, 1992, the Commission released a *Notice of Proposed Rulemaking*[1] (*NPRM*) proposing changes to the rules that govern formal complaints against common carriers. With the goal of expediting resolution of formal complaints, we presented for public comment rules which would shorten filing deadlines, eliminate unnecessary or redundant pleadings, and modify and consolidate the discovery process.

2. This *Report and Order* adopts certain of the proposed rules which will further the objective of more timely complaint resolution without adversely affecting the parties. Specifically, we are adopting rules providing for oral rulings by the staff on interlocutory matters, protection of proprietary materials exchanged during discovery, uniform pleading standards for briefs, and elimination of reply pleadings. We are not, however, substantially modifying the formal complaint timetable since the modest time savings that could be realized by such revision are outweighed by inconvenience and burden on the parties. We are also retaining relevance as a basic standard for discovery. The full text of the rules is set forth in Appendix B.

II. BACKGROUND

3. The Commission's pleading requirements and procedures applied in formal complaints cases were last revised in *Amendment of Rules Governing Procedures to Be Followed Where Formal Complaints Are Filed Against Common Carriers, Report and Order*, 3 FCC Rcd 1806 (1988) (*1988 Formal Complaints Rules Revision*). That action set explicit requirements with respect to the content of pleadings, codified informal practices regarding briefs and status conferences, and introduced discovery. Since adoption of those rules, the demand on Commission resources imposed by formal complaint cases has changed significantly. In the four fiscal years since the last rule revision, receipts of formal complaints have more than doubled over the previous four year period. In addition, in 1988, after adoption of the revised formal complaint rules, Section 208 of the Communications Act (the Act) was amended to require that complaints challenging the lawfulness of "a charge, classification, regulation or practice" are to be resolved within 12 months of filing, 15 months if the case involves facts of "extraordinary complexity." 47 U.S.C. § 208(b)(1); Federal Communications Commission Authorization Act of 1988, Pub. L. No. 100-594, 102 Stat.

[1] Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, 7 FCC Rcd 2042 (1992).

3021 (Nov. 3, 1988) (FCCAA). Both the unprecedented number of complaints filed during recent years and the statutory time limits for resolution imposed by Section 208(b)(1) compelled us to examine ways in which the complaint process can be accelerated. That objective led to initiation of this proceeding and the specific rule changes proposed in the *NPRM*.

4. Twenty comments and 11 replies regarding the proposed revisions were filed by parties who have participated in the formal complaint process as complainants, defendants, or counsel. Commenters are listed in Appendix A. Unanimously, the parties support our objective of expediting resolution of formal complaints. However, many commenters believe that many of the contemplated time savings would be outweighed by additional burdens on the parties. Further, some commenters maintain that in some instances, the proposed rules may not operate as anticipated and, actually, could increase controversies and prolong proceedings. Finally, many commenters note that the *NPRM* seeks to reduce the time necessary to close the record in formal complaint proceedings. They urge the Commission to also explore ways to promote more timely resolution once the record is closed.[2]

5. The following discussion first addresses the specific *NPRM* proposals, discussing the proposed rule sections sequentially. We then address miscellaneous matters raised by the parties that were not addressed in any specific *NPRM* proposal.

III. DISCUSSION

A. General pleading requirements (Section 1.720)

6. *Proposal.* We proposed to amend general pleading requirements to explicitly require that "all statements purporting to summarize or explain Commission orders or policies must cite, in standard legal form, the Commission ruling upon which such statements are based."

7. *Comments.* Only one party, Allnet, commented on this proposal, voicing support yet proposing further amendment to require parties to file with their pleadings all materials which are cited in those pleadings and are not already on file with the Commission. Specifically, Allnet would require a party to include with its pleadings "all documents [which] it intends to use to support its assertions of fact." If such documentation were not filed along with the underlying pleading, it could not be relied upon at a later date. Allnet asserts that such a requirement is necessary to check the tendencies of defendant-carriers to "sandbag" documents supporting their assertions. In Allnet's view, this provision would reduce discovery and facilitate settlement by placing supporting documentation on the record at the earliest possible time. Two parties express strong opposition to Allnet's plan. Ameritech contends that Allnet's filing requirement would, in practice, effectively shift the burden of proof from the complainant to the defendant. United Video *et al.* agree that an undue burden would fall on defendants. Moreover, according to these commenters, such a filing requirement would add to the formal complaint process a new area of peripheral dispute and increase administrative burden on the Commission staff who would have to handle a virtual flood of documentary records.

8. *Decision.* We believe our original proposal to require full identification and proper citation of Commission decisions or policies that are discussed in formal complaint pleadings will enhance the ability of the Commission staff and opposing parties to quickly identify and research the alleged basis of claims being made. Thus, as proposed in the *NPRM*, this provision is being added to our general pleading requirements. However, we will not adopt Allnet's proposal. We are not confident that discovery would, in fact, be reduced as Allnet envisions. Certainly, many of the disputes that have delayed the discovery process would not be eliminated or reduced, but simply transferred to a different point in the proceeding. We believe that the discovery process, discussed in more detail below, provides an adequate vehicle for parties to seek the facts and documentation necessary to prosecute or defend their claims. We agree that Allnet's documentary filing requirement would inevitably add to the controversies attendant to our consideration of formal complaints.[3] At the least, we foresee disputes over what constitutes a citation or reliance sufficient to require submission of the underlying evidence, what portion of a document must be submitted, whether a document is exempt due to privilege, and whether a document will be accorded confidential status.

B. Answers (Section 1.724)

9. *Proposal.* The *NPRM* proposed to reduce the permissible time for a defendant to file an answer to a complaint from 30 to 20 days from date of service. In making this proposal, we noted that a 20 day deadline conforms with the parallel requirements contained in Rule 12(a) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(a).

10. *Comments.* While some parties support cutting ten days from the answer deadline, most commenters object to any reduction in the time available to respond to a complaint. Those advocating a reduced deadline appear to support the obvious time savings and say that in those cases where additional time is necessary extensions could be granted.[4] Those parties objecting to a reduced answer deadline predict that defendants would be more likely to seek extensions of time if the deadline is cut. Commenters

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[2] The Commission is firmly committed to resolving complaints in the most timely manner possible. In addition to the procedural proposals set forth in the *NPRM*, which were developed as a result of an internal review of the formal complaint process, we have also improved case management and our own internal procedures. In a comprehensive drive to decrease the amount of time complaints remain pending after the record has been closed, we have also instituted a backlog reduction plan and implemented aggressive discovery management. In addition, a pilot project has been initiated to offer parties to formal complaints the option of seeking to resolve their disputes through alternative dispute resolution (ADR). ADR provides an opportunity for parties to explore settlement through mediation or arbitration before a neutral party.

[3] To the extent Allnet's proposal is intended to reach unpublished decisions, private industry studies, and other similar documentation that is not readily available, there is already ample authority in existing rules to ensure that such materials can be obtained by the Commission and opposing parties. *See* 47 C.F.R. §§ 1.720(g), (h); 1.731.

[4] *See, e.g.*, Comments of Ameritech at 5; Reply Comments of Ameritech at 2; Comments of Allnet at iv; Comments of Bell Atlantic at 1 n. 4; Comments of WTG at 1-2.

contend that such requests complicate the proceedings and, in many cases, reduce or eliminate the contemplated time savings.[5] Further, commenters note that under the Commission's rules, extensions of time are granted only for good cause, while in federal civil practice such extensions are routinely granted.[6] In addition, several parties suggest that answers filed in federal district court may require less preparation than those filed in formal complaint cases before the Commission.[7] Under the Federal Rules of Civil Procedure only notice pleading is required, with a full evidentiary trial available to establish pertinent facts. In contrast, complete "fact" pleading is required before the Commission to establish a paper record sufficient for resolution. Hearings are conducted in only the very rarest circumstances.

11. Finally, those opposing any reduction in the answer deadline emphasize that in order to answer a complaint, a defendant -- who may be completely unaware of the existence of a dispute until served with the complaint -- may be required to retrieve relevant materials from offsite storage and locate individuals no longer employed by the company. In contrast, the complainant will have had up to two years to prepare a formal complaint.[8]

12. *Decision.* We will not change the current answer deadline. In proposing the reduced answer deadline, as well as other time reductions discussed below, it was our general belief that although the individual increments at issue may be relatively short, such increments accumulate and can be significant in allowing us to meet our obligation to issue final appealable orders within the 12-15 month deadline applicable to those complaints falling within the scope of Section 208(b)(1) of the Act. 47 U.S.C. § 208(b)(1). We remain concerned with ensuring that formal complaints are ripe for resolution at the earliest possible time, especially in those cases subject to expedited processing under Section 208(b)(1). However, we are also committed to ensuring that parties to formal complaint actions are afforded a reasonable opportunity to prosecute or defend a complaint. With respect to answers to complaints, it is important that defendants are not unduly hampered in responding to the charges against them. We believe those parties opposing the reduced deadline have explained that the different procedures and requirements imposed by the Commission's rules and the Federal Rules of Civil Procedure justify different deadlines for parallel pleadings.[9] In addition, these commenters have presented reasonable evidence that given the possible difficulties of gathering information regarding transactions up to two years old, the proposed time reduction would unreasonably impair a defendant's ability to answer fully the complainant's allegations without yielding a benefit sufficient to mitigate this added burden.

C. Replies (Section 1.726)

13. *Proposal.* We proposed to prohibit complainants from filing replies to defendants' answers to complaints except in those limited circumstances when an answer presents affirmative defenses factually different from any denials contained in the answer. Under the present rule, replies are permitted but not mandatory; failure to reply does not constitute an admission of any facts contained in the answer except with respect to those included in affirmative defenses.

14. *Comments.* Most of the parties commenting on our proposal either actively support or do not object to the elimination of routine replies.[10] Nonetheless, several parties suggest some adjustments to prevent confusion and to ensure that admissions are not gained as a result of a party's difficulty in distinguishing whether an affirmative defense is factually different from a denial.[11] Similarly, the parties opposing adoption of the proposed rule are also concerned with the possibility for confusion, and suggest that there may not always be a clear distinction between a defense and a denial.[12] These parties also suggest that replies are a valuable element of the adversarial process that should be preserved.[13]

15. *Decision.* Replies will no longer be permitted under our rules, except to respond to specifically captioned affirmative defenses contained in the defendant's answer to the complaint. The fact that the complainant bears the burden of proof was a significant factor when the Commission decided, four years ago, to retain routine replies to answers.[14] However, as we have noted already in our current review of the formal complaint rules, it has been our experience that in most cases replies do not significantly aid the Commission in resolving factual or legal issues and, in fact, often simply repeat arguments that were, or should have been, made in the original complaint.[15] Although one party suggests that defendants will be inclined to "take greater liberties with the facts" if they know that replies are not permitted,[16] we also observe that complainants might be encouraged to file more carefully drafted complaints if routine replies are discontinued. In addition, as explained more fully below, because of other rule changes regarding the submission of briefs, complainants will have an additional opportunity, beyond that afforded by the complaint itself, to present their cases to the Commission. Thus, discontinuing the pleading opportunity encompassed by routine replies will not ad-

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[5] Comments of MCI at 8; Comments of Sprint at 3; Comments of U S West at 3.

[6] Comments of Centel at 3; Comments of GTE at 2; Comments of NYNEX at 3; Comments of United Video *et al.* at 4.

[7] Comments of BellSouth at 2; Comments of Hirrel at 5; Comments of SWBT at 1-2; Comments of United Video *et al.* at 4.

[8] Comments of Centel at 2-3; Comments of FCBA at 3-4; Comments of MCI at 7.

[9] In the *NPRM*, we noted that the Federal Rules can provide useful guidance in drafting our procedures. We also recognized that it is not necessary, or even preferable in all cases, to model all of our rules directly on the Federal Rules of Civil Procedure. *NPRM*, 7 FCC Rcd at 2043 n.3.

[10] Comments of Allnet at v; Comments of AT&T at 3; Comments of Ameritech at 5; Reply Comments of NATA at 1-2; Comments of Sprint at 3-4; Comments of U S West at 5; Comments of United Video *et al.* at 3, 6; Comments of WTG at 2.

[11] Comments of Allnet at v; Reply Comments of NATA at 1-2; Comments of Sprint at 4.

[12] *E.g.*, Comments of FCBA at 6; Comments of MCI at 11-13.

[13] *E.g.*, Comments of Hirrel at 7.

[14] *1988 Formal Complaints Rules Revision*, 3 FCC Rcd at 1808.

[15] *NPRM*, 7 FCC Rcd at 2043.

[16] Comments of Hirrel at 7.

versely affect a complainant's ability to satisfy the burden of proof. Further, to the extent that a complainant's right to reply currently provides a check on the veracity of a defendant's answer, the right to file briefs can serve a similar purpose. In addition, it has been our experience that briefs are much more valuable tools for the staff to use in assessing the validity of a complaint. Thus, eliminating routine replies will not harm either the complainant's interests in prosecuting a case or the Commission's interests in compiling a complete record for resolution.

16. Nonetheless, we believe that some refinements are necessary to remove confusion regarding the limited circumstances in which a reply will be allowed. We agree that it could be difficult to discern whether an affirmative defense is factually different from an answer. Consequently, we will not adopt this distinction to determine whether or not a complainant is entitled to file a reply. Instead, replies will be permitted any time an answer includes an affirmative defense. Some parties suggest that it can be difficult to distinguish affirmative defenses from denials; we believe that this concern can be easily remedied by requiring that affirmative defenses be specifically captioned as such.[17] In addition, failure to reply will no longer be construed as an admission of any allegations contained in an affirmative defense. Thus, replies will be truly voluntary.

D. Motions (Section 1.727)

17. *Proposal.* We proposed several changes intended to curb the proliferation of motions that either address procedural issues of minimal significance or repeat substantive allegations contained in the major pleadings. First, we proposed to alter the filing window during which motions may be submitted. Currently, motions to make more definite and certain must be filed within 15 days after service of a complaint while other motions can be filed at any time during the pendency of a case at the discretion of the movant. Under the proposed rules, no motions could be filed until the time an answer is due, except when a complainant moves for dismissal. In addition, motions to make more definite and certain would be filed with the answer to the complaint, which would, notwithstanding the motion, be required to respond to those allegations that could reasonably be addressed. Motions for dismissal or summary judgment would also be due along with the answer, unless they are based upon information discovered after the deadline for filing the answer and clearly so state, identifying the particular information and the occasion of its discovery. Finally, consistent with the proposal to discontinue routine replies to answers to complaints, replies to oppositions to motions would also be prohibited in formal complaint proceedings.[18]

18. *Comments.* In general, the commenters oppose the proposed amendments regarding formal complaint motion practice. Some parties disagree with the purpose underlying the proposed rules and suggest that rather than attempting to discourage the filing of motions, the Commission should, in fact, encourage submission of such pleadings which, they contend, can be an efficient means of framing issues and expediting resolution.[19] Even most of those parties who do not apparently quarrel with our goal of reducing the number of motions filed in formal complaint cases, believe that the proposed rules could be counterproductive while at the same time unduly restricting a party's ability to prosecute or defend a formal complaint.[20] Specifically, they contend that a defendant should not be precluded from seeking clarification or dismissal before answering an impermissibly vague or legally insufficient complaint. Some parties suggest that if motions to make more definite and certain must be filed with the answer, defendants will simply deny unclear allegations. If the motion is granted and a reframed complaint is presented, additional time will be required for answering. Parties also oppose any pre-discovery deadline for summary judgment motions, contending that such motions are typically filed to present significant factual evidence that allegedly obviates the need for a trial.[21] Finally, several parties oppose elimination of replies to oppositions to motions.[22]

19. *Decision.* We agree that motions, when judiciously used, can be an effective means of promoting resolution. However, frequently such pleadings are not used in a judicious manner and instead become a means for delay rather than expedition. In proposing the motion rules encompassed by the *NPRM*, we attempted to discourage the filing of repetitive or inconsequential motions while still protecting the parties' legitimate interests in prosecuting or defending a complaint in the most complete manner possible. Based upon our review of the record we now conclude that these proposed rule changes could interfere with these interests. Thus, with the exception of the provision eliminating replies to oppositions to motions, we will not adopt the proposed rules but retain existing rules governing motion practice in formal complaint proceedings.

20. As explained in the *NPRM*, we believe that replies to oppositions to motions are not essential to protecting the interests of the parties or significantly aiding the Commission in resolving major controversies. We recog-

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[17] Section 1.724, pertaining to answers, is being amended to specify this requirement.

[18] We also proposed to change the deadline for filing motions to compel responses to discovery initiatives. This proposal is addressed below in Section E(2) which concerns discovery matters. See ¶ ¶ 25-31.

[19] Comments of GTE at 2-3; Reply Comments of United Video *et al.* at 5.

[20] *E.g.*, Reply Comments of Ameritech at 3; Comments of MCI at 8-10; Comments of Pacific Companies at 1-2.

[21] Comments of GTE at 3; Comments of MCI at 9-10; Comments of Pacific Companies at 2; Reply Comments of SWBT at 2-3; Reply Comments of United Video *et al.* at 5. Some parties also suggest that motions for summary judgment either are not, or should not be, permitted in formal complaint cases unless they are explicitly identified in our rules. Comments of U S West at 6; Reply Comments of SWBT at 3. The specific identification of certain types of motions in the rules, however, would not constitute an exclusive or comprehensive listing of all actions permissible in formal complaint proceedings. In fact, summary judgment motions have been filed in past cases. *See* NRTC v. Southern Satellite Systems, et al., File Nos. E-91-044 - 046, 7 FCC Rcd 3213, 3215 (Com.Car.Bur. 1992).

[22] Reply Comments of Ameritech at 3; Comments of NATA at 11; Comments of Pacific at 2; Comments of United Video *et al.* at 7-8. *But see* Reply Comments of Allnet at 4-5; Comments of FCBA at 7.

nize that, as the parties have noted, the time currently allotted for the filing of such replies is only five days. However, our proposal to eliminate this pleading opportunity was not premised exclusively on time-saving factors. We also seek to compile a more concise record for resolution. Discontinuation of replies in the motion context should encourage movants to support more thoroughly their requests with appropriate facts and legal authorities in the original pleading.

E. Interrogatories to parties (Section 1.729)
Other forms of discovery (Section 1.730)
Confidentiality of information produced through discovery (Section 1.731)

21. In these three sections, we proposed rules intended to simplify and expedite discovery. We proposed to accomplish this objective by reducing certain filing windows and deadlines, bifurcating proceedings so that discovery regarding damages would be prohibited until after liability had been established, providing confidential treatment of materials exchanged through discovery, and specifying that discovered materials should not be filed with the Commission unless directed by the staff. In addition, we sought comment as to whether we should draft new rules regarding several other discovery-related matters. Specifically, we asked whether removing relevance as grounds for objecting to an interrogatory or document request would expedite discovery without adversely affecting the parties. In addition, we invited comment as to whether discovery should be permitted only when so ordered by the staff. Finally, assuming that damage and liability would be acted on separately, commenters were asked to consider whether it would be advantageous to provide for a limited period, following release of an order assessing liability, during which the parties could engage in settlement negotiations or submit their damage claims to voluntary alternative dispute resolution.

1. Self-Executing Discovery

22. *Proposal.* In the *NPRM*, we stated our belief that discovery is not always necessary to compile an adequate record for resolution. Therefore, we asked commenters to consider whether self-executing interrogatories should be retained or whether we should adopt a rule whereby no discovery, including interrogatories, could be undertaken absent an affirmative order by the staff.

23. *Comments.* Only one party -- Bell Atlantic -- believes that it would be desirable to prohibit discovery unless ordered by the staff. Bell Atlantic agrees that discovery is not always necessary, particularly to resolve issues of liability. In reply, MCI suggests that Bell Atlantic's reservations regarding self-executing discovery would be allayed quite simply by deferring discovery regarding damages until after liability has been established, as provided in the bifurcated approach to discovery. Several commenters strongly oppose any move to rescind self-executing discovery, suggesting that the relaxation of common carrier reporting requirements, implemented under the Commission's deregulatory policies, has elevated the importance of discovery as a tool in developing the facts necessary to resolve disputes.[23]

24. *Decision.* We believe the benefits of self-executing discovery through interrogatories are substantial and should be retained. We tentatively expressed this view in the *NPRM*, and have received no comments that convince us otherwise. While we also believe that discovery is not strictly necessary in all cases, it is our conclusion that the delays and disputes that would certainly occur as parties sought permission to engage in discovery would not promote expedition. We fear that requiring Commission authorization before any discovery can be undertaken would simply add another area of dispute and potential for delay. In our view, the burden imposed by a limited number of interrogatories does not outweigh the advantages in assembling, at the earliest possible time, a factual record for resolution.[24]

2. Discovery Timetable

25. *Proposal.* In the *NPRM*, we proposed that the time available to initiate discovery be reduced so that, unless otherwise ordered by the staff, neither interrogatories nor document requests could be served before an answer is due or more than 20 days after such date.[25] We also proposed to alter certain filing deadlines so that (1) answers to interrogatories and responses to other discovery initiatives documents would be due within 20 days after service instead of 30 days; (2) objections to the breadth of discovery would be due within 10 days after service, rather than along with the answers to interrogatories; and (3) motions to compel answers and/or production of documents would be due within 5 days, rather than 15 days, after the answer deadline or the date objections were filed.

26. *Comments.* Commenters generally oppose our proposals to alter the discovery timetable. Several parties are concerned that the abbreviated time frame for initiating discovery would put defendants at a particular disadvantage in framing their interrogatories and document requests.[26] These parties again note the disparate circumstances of complainants, who have had up to two years to prepare a case, and defendants, who may be served with

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[23] Comments of FCBA at 8-9; Comments of Hirrel at 8; Comments of MCI at 14, 17-18; Reply Comments of MCI at 12; Comments of NATA at 6. Some parties also suggest that our rules should be modified to make requests for production of documents self-executing. Comments of NATA at 6-8; Comments of Sprint at 4-5. *But see*, Reply Comments of BellSouth at 4; Reply Comments of Pacific Companies at 3; Reply Comments of United Video *et al.* at 1-2.

[24] Self-executing discovery is not being expanded to include requests for depositions or production of documents. The current system whereby parties seek Commission approval for such discovery tools strikes a balance between a requester's interest in compiling a complete factual record and a respondent's interest in minimizing discovery burdens.

[25] Currently parties may initiate discovery by serving up to 30 single self-executing interrogatories during the time period beginning with service of the complaint and ending 30 days after the date a reply is due to be filed. In addition, parties may seek further discovery up to 30 days after answers to interrogatories are due.

[26] *E.g.*, Comments of FCBA at 9-10; Comments of MCI at 15. Separately, several commenters support the proposal to defer any discovery until the time the answer to a complaint is due. *See e.g.*, Comments of NYNEX at 4; Comments of United Video *et al.* at 9.

little or no warning. MCI suggests that the defendant's preparation of discovery requests may be especially difficult as they pertain to a complainant's reply, since the proposed deadline for serving interrogatories or seeking document production would be only 10 days after the reply is filed. NYNEX suggests that rather than cutting the time available to serve interrogatories, the Commission should extend the deadline to conform with that currently in effect, which assumes that replies will be routinely filed.

27. Some parties are also concerned that subjecting requests for production of documents to the same initiating deadline as that applied to interrogatories will thwart the effective use of this discovery tool.[27] These parties argue that in many instances the need for document production or other additional discovery is only apparent after reviewing the answers to interrogatories. The DC PSC suggests that motions seeking additional discovery, including production of documents, be permitted up to 15 days from receipt of answers to interrogatories.

28. Parties also object to cutting deadlines for the submission of various discovery papers. Rules which would cut deadlines for answers to interrogatories, objections to the breadth of discovery, and motions to compel are overwhelmingly opposed by those parties commenting on the proposals.[28] They assert that the proposed time cuts would impose undue burdens on the parties without yielding any significant or demonstrable benefits toward expediting or simplifying discovery. In fact, some parties suggest that these provisions could backfire by generating more motions for extension of time and encouraging parties to file motions to compel simply to preserve their rights.[29]

29. *Decision.* We believe that commenters have presented legitimate reasons for retaining most elements of the existing timetable for discovery. First, we agree that interrogatories and requests for other discovery, such as production of documents, should be maintained on separate schedules. This enables parties to review answers to interrogatories to determine what, if any, further discovery is desired. Thus, we will not adopt the proposed rule that would require that requests for discovery beyond the self-executing interrogatories be initiated within the same period as the interrogatories. However, the time available to request further discovery will be reduced. Any requests seeking document production, depositions, or additional interrogatories will be due within 15 days after the date that answers to self-executing interrogatories are served, rather that within 30 days, as currently allowed. We believe that given the limited number of self-executing interrogatories permitted under Section 1.729, this period is sufficient to review answers and determine what further discovery may be necessary.

30. The initiating date opening the filing windows for discovery will not be changed. The *NPRM* proposal that all discovery be deferred until the time an answer is due presumed that discovery would be conducted only when so ordered by the Commission; the deferral of discovery until after the answer due date would have provided a period during which the staff could have reviewed the complaint to determine whether any, or what, discovery should be permitted. However, since the right to engage in discovery through self-executing interrogatories is being preserved, we believe our goals of expedition would be better served by retaining the current rule whereby the period in which discovery may be initiated runs from service of the complaint. In addition, the terminating deadline for service of self-executing interrogatories will not be cut by ten days as proposed in the *NPRM*. We find credible the commenters' assertions that such a reduction could unfairly affect a defendant's ability to properly frame such discovery requests. Thus, this deadline will be set at 30 days after the date an answer to the complaint is filed.[30]

31. We are also convinced that the time savings that would accrue from reducing the deadlines for response to discovery initiatives (from 30 to 20 days) and for filing motions to compel (from 15 to five days) are not significant enough to outweigh the hardships to the parties caused by reduced deadlines. The same factors relating to retrieval of relevant records and identification and location of knowledgeable individuals that influenced our decision not to cut the deadline for defendant's answer to a complaint also apply here with respect to answers to interrogatories or other discovery initiatives. In addition, with respect to motions to compel, we believe that the parties have raised a valid point in suggesting that a deadline as short as five days, as proposed in the *NPRM*, could deprive parties of the opportunity to analyze the answers provided in response to discovery and determine whether a motion to compel is truly necessary. Parties could be inclined to file such motions simply to preserve their rights when, given more time, they might have concluded that they were not necessary.

3. Bifurcation of Discovery

32. *Proposal.* In the *NPRM*, we asked parties to address whether the delays and expenses of protracted discovery could be ameliorated by postponing any discovery regarding damages until after we ruled on liability. The premise underlying this proposal was that the considerable time and effort expended by the parties and the Commission staff on damages discovery is effectively wasted if no violation or liability is found. We asked whether the savings that could be realized through such bifurcation would be significant, especially in light of the possibility that under a bifurcated approach, discovery delay and expenses could actually increase if liability were found and a second round of discovery on the separate issue of damages was required. Parties were asked if they would favor the imposition of a brief settlement period following a liability determination and prior to any further proceedings on damages.

33. *Comments.* Many commenters support the general

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[27] Comments of DC PSC at 6-7; Comments of MCI at 15.

[28] Comments of BellSouth at 4-5; Comments of DC PSC at 5-6; Comments of MCI at 15-17; Reply Comments of MCI at 14-16; Comments of NYNEX at 4-6; Comments of Pacific Companies at 4-5.

[29] Reply Comments of MCI at 15; Comments of NYNEX at 5-6.

[30] We recognize that for those cases where replies are filed, this deadline represents a reduction in the time currently available to a defendant to serve any interrogatories based on the reply. However, given the limited information that should be properly included in a reply, the time allotted should be sufficient.

proposition of deferring damages discovery,[31] while still expressing some of the same concerns shared by those parties who oppose such a bifurcated structure. One party believes that the effectiveness of bifurcation may be dependent upon Commission efforts to aggressively promote settlement.[32] If a bifurcated approach is used, several parties endorse the proposal to establish a brief settlement period following the liability determination and prior to commencement of damages discovery.[33] Several parties, including both supporters and opponents of a bifurcated discovery system, speculate that deferring discovery regarding damages may discourage early settlement efforts since the parties may not be adequately informed as to what the case is "worth."[34] In addition, some commenters note that since many areas of inquiry can relate both to liability and damages, bifurcation may be difficult to administer, and may generate new discovery disputes.[35] Opinion is virtually unanimous that when the proposed inquiry concerns issues of both liability and damages, full discovery should be permitted during the liability phase. BellSouth, however, apparently believes that even with such a proviso, any attempt to bifurcate discovery is simply unworkable. Thus, BellSouth states that even if the Commission chooses to adopt a bifurcated approach to resolution, discovery itself should not be similarly bifurcated. Finally, some parties urge the Commission to retain discretion to conduct each proceeding in the manner determined to be most effective for the individual case at hand.[36]

34. *Decision.* We are not adopting a rule providing for bifurcated discovery in all cases. It is apparent that in cases where liability is not found, a bifurcated approach to discovery would reduce the burdens of contentious and protracted discovery both for our staff and, to an even greater degree, for the parties. In fact, we have already exercised our discretion to bifurcate discovery when information regarding certain distinct threshold issues was necessary for resolution. However, given the delay which is almost certain to be experienced if two rounds of discovery should be necessary, bifurcation is not appropriate for all cases.

35. Accordingly, we are adopting a rule explicitly affirming our discretion to conduct bifurcated proceedings, either by bifurcating discovery itself, or by bifurcating our action into liability and damages phases. We are specifying, as several commenters urge, that in those cases where discovery is bifurcated, inquiries that relate dually to liability and damages will be permitted during the initial discovery conducted during the liability phase. In addition, as suggested by Centel, we are adopting a rule whereby in bifurcated proceedings, parties will be afforded five working days following a decision establishing liability to notify the Commission as to whether they wish to pursue settlement. If parties inform the staff that they are entering settlement negotiations, any discovery regarding damages will be deferred for at least 20 days after release of the liability order.

4. Objections Based on Relevance; Admissions through Discovery

36. *Proposal.* In the *NPRM*, we solicited comment regarding the desirability of removing relevance as a permissible objection to discovery. We suggested a system whereby parties could refuse to answer interrogatories seeking information they believed to be irrelevant. However, such a refusal to answer would be deemed to be an admission, relevant only for purposes of resolving the complaints, of allegations contained in the interrogatory.

37. *Comments.* Commenters are virtually unanimous in their vigorous opposition to any system whereby admissions are gained by refusal or failure to answer properly an interrogatory.[37] The parties agree that abandoning relevance and adopting the admission process described in the *NPRM* would encourage abusive discovery, as parties seek to gain admissions rather than information. The system is unworkable, they contend, since a proper interrogatory asks a question rather than makes an allegation. A process of gaining admissions through discovery would introduce new areas of disputes as parties argue over whether an admission was made and what was actually admitted. In addition, most commenters voice similar opposition to any deviation from the current relevancy objection.[38] According to NYNEX, abandoning the relevancy standard is inconsistent with allowing objections to the breadth of discovery as provided in Section 1.729(c) of the proposed rules. *NPRM*, 7 FCC Rcd 2042, 2047. Some parties suggest that the Commission adopt the explicit requirements for relevancy enunciated in the Federal Rules of Civil Procedure -- discovery is permitted regarding any matter relevant to the subject matter of the action or any matter reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P., Rule 26(b)(1).[39]

38. *Decision.* We believe the parties have demonstrated convincingly that the relevancy standard should be retained in formal complaint discovery. We share the concerns they raise that disallowing objections based on relevance would subvert the legitimate purpose of discovery as a means by which a party can gather the factual

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[31] Comments of Centel at 4-5; Comments of Hirrel at 9; Comments of MCI at 19; Comments of NYNEX at 6-7; Comments of U S West at 7-8; Comments of United Video *et al.* at 9, 11-13; Comments of WTG at 2.

[32] Comments of FCBA at 9.

[33] Comments of Bell Atlantic at 2; Comments of Centel at 5-6 (to limit potential delay, proposes deadline of five days for parties to notify Commission as to whether they wish to pursue settlement); Comments of NYNEX at 6-7; Comments of United Video *et al.* at 13; Comments of WTG at 2.

[34] Comments of BellSouth at 4; Comments of GTE at 5; Reply Comments of MCI at 23-24. *But see*, Reply Comments of Allnet at 3-4.

[35] *E.g.*, Comments of BellSouth at 4; Comments of DC PSC at 5; Reply Comments of MCI at 23-24.

[36] Comments of DC PSC at 4-5; Reply Comments of Pacific Companies at 2.

[37] Continental alone voices support for such a system. Comments at 3-4.

[38] *E.g.*, Comments of AT&T at 5-7; Comments of Bell Atlantic at 3; Comments of BellSouth at 8-9; Comments of FCBA at 10-12; Comments of MCI at 20; Comments of NATA at 9-10; Comments of NYNEX at 8-10; Comments of Pacific Companies at 5; Comments of Sprint at 5; Comments of U S West at 8-10; Comments of United Video *et al.* at 13-14; Reply Comments of USTA at 2-3.

[39] Comments of FCBA at 10-12; Comments of MCI at 22; Comments of NYNEX at 8; Comments of Sprint at 6.

information necessary to advance its case. Without relevance as a standard, discovery would truly become a "fishing expedition" as parties seek to obtain a wide range of information possibly having little bearing on the allegations of the complaint. Thus, we will retain those existing provisions which limit discovery to "any nonprivileged matter which is relevant to the pleadings" and specify that parties shall not be permitted "to obtain information which is beyond the scope of permissible inquiry relating to the subject matter of the pleadings."[40] Given this clear recognition of relevance as a standard for determining the proper scope of formal complaint discovery, it is unnecessary to adopt the specific language employed in the Federal Rules of Civil Procedure, which is geared towards evidentiary trial procedures that are not part of the formal complaint process.

39. The proposal to abandon relevance as a requirement for discovery was intended to work in tandem with the proposed system whereby admissions are gained by a party's failure to answer an interrogatory. However, the commenters have demonstrated that the admission proposal would increase the protracted and contentious aspects of discovery and undermine its legitimate purpose. Discovery is conducted to elicit information; interrogatories ask questions. An interrogatory in a formal complaint case might ask a carrier to list its customers or specify the rates and terms of service offered to those customers. We agree that it would be difficult, if not impossible, to implement a system whereby such requests for information are transformed into admissions.

5. Treatment and Filing of Discovered Materials

40. *Proposal.* In the *NPRM*, we proposed a new rule providing for the confidential treatment of certain materials exchanged by the parties through formal complaint discovery. This provision is available to parties who believe in good faith that materials subject to discovery fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA). The proposed rule is modeled on private protective agreements entered by parties in past complaint cases and specifically limits the manner in which an opposing party may use, duplicate, and disseminate proprietary materials obtained through discovery.[41] In addition to providing for confidential treatment by the parties, we also proposed that discovered materials no longer be filed with the Commission unless specifically ordered by the staff.

41. *Comments.* Parties generally endorse with enthusiasm the proposal to add a confidentiality rule applicable to discovered materials. Several parties agree with the FCBA that this provision is "one of the most productive aspects of the *NPRM*,[42] and will both simplify and expedite discovery by reducing or eliminating the long delays currently experienced as parties negotiate private protective agreements. Nonetheless, some parties suggest modifications to refine the proposed rule and provide for sanctions if the rule is violated.[43] Only two parties oppose adoption of any confidentiality standard. Bell Atlantic believes that uniform confidentiality provisions are unworkable since they will be too restrictive in some cases and not restrictive enough in others. At the least, states Bell Atlantic, the rule should be modified so that the confidentiality provisions are subject to the mutual consent of both parties. SWBT contends that the formal complaint process is being used by parties to gain access to the sensitive business data of regulated carriers and that the confidentiality provisions enunciated in the *NPRM* do not address this problem. They believe that provisions for limited dissemination and ultimate return of all materials subject to the confidentiality rule are unworkable and unverifiable. SWBT suggests that only when proprietary information is necessary to a *prima facie* case or defense should it be disclosed to an opposing party. In no event, should that party be permitted to obtain a copy or take notes from the document. Instead access should be subject to execution of a confidentiality agreement and accomplished through the Commission so that the document could only be reviewed at Commission offices with all parties present. No reference to the document could be made in subsequent pleadings. Some parties challenge these strict procedures, noting that competitively sensitive business data are not *per se* shielded from discovery like privileged materials.[44] Thus, so long as adequate protective methods are applied and enforced to preclude improper use, such materials must be disclosed. Allnet notes that, as a practical matter, SWBT's procedures would increase both discovery disputes and FOIA requests for materials filed with the Commission.

42. Opinion is evenly split among the few commenters who address the *NPRM* proposal which would eliminate the requirement that materials exchanged through discovery must be filed with the Commission. Those who favor discontinuing routine submission of discovered materials point to the time that could be saved by both the parties and the Commission in not having to duplicate or handle possibly massive amounts of documentation.[45] On the other side, one commenter expresses concern that parties may be less cooperative in responding to discovery if they are not required to file their responses with the Commission or, at least, submit certification that discovery has been answered or an explanation as to why not.[46] NATA contends that the importance of required routine submission of discovered materials is amplified since parties in formal complaint proceedings do not always have the opportunity, enjoyed in court through trial, to bring such information to the attention of decisionmakers. Both

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[40] 47 C.F.R. § 1.729(a).

[41] Specifically, the proposed rules provide that: proprietary materials could only be viewed by certain individuals employed by the recipient; duplication would be restricted and the recipient would be required to maintain a log recording all production and distribution of all copies made; upon termination of the complaint proceeding all copies of the designated materials and related logs would be provided to the producing party; and any notes or work product based on designated material would be destroyed.

[42] Comments of FCBA at 12. *See also, e.g.*, Comments of MCI at 19; Comments of NATA at 10-11; Comments of Sprint at 4; Comments of U S West at 11-12.

[43] Comments of Allnet at ix-xii; Comments of Ameritech at 9; Comments of NATA at 11; Comments of United Video *et al.* at 16.

[44] Reply Comments of Allnet at 2; Reply Comments of MCI at 22-23; Reply Comments of NATA at 3.

[45] Comments of FCBA at 12-13; Comments of SWBT at 3; Comments of United Video *et al.* at 16.

[46] Comments of Continental at 5-6.

NATA and Allnet assert that the availability of discovered materials through the Commission will assist parties involved in similar disputes and expedite resolution of such actions by reducing the need for repetitive discovery.

43. *Decision.* We are adopting the proposed confidentiality rules with certain modifications to address concerns raised by the parties. Specifically, we are adding language to make clear that confidential information may not be used for any purpose other than prosecuting or defending the complaint at issue, or disclosed to any employees other than those directly involved in such prosecution or defense. In making these modifications, we are adopting the language proposed by Allnet, including that requiring parties receiving confidential materials to state affirmatively, by notarized statement, that they have reviewed the Commission's confidentiality provisions pertaining to formal complaint discovery and understand and accept the limitations thus imposed.

44. We share some of Bell Atlantic's implied concerns regarding the inevitable disputes over whether particular information merits confidential treatment or whether it is so exceptionally sensitive that the safeguards accorded by our rules are insufficient to protect fully the interests of the producing party or any others whose data are incorporated in materials to be produced. However, we do not believe that including in our rules a statement that the confidentiality provisions are subject to the mutual consent of both parties will either expedite discovery or protect the legitimate proprietary interests of the parties in any manner not already encompassed by existing rules. Instead, we believe that such a provision would diminish the benefits of adopting uniform confidentiality standards by, in effect, inviting parties to insist upon negotiating separate terms for nondisclosure. We believe that the proposed rule, with the modifications specified above, will offer fully adequate protection in the vast majority of cases. In those extremely limited circumstances when a party legitimately believes the protection is insufficient, we anticipate that the party would decline to comply with the discovery request. The adequacy of the confidentiality provisions reasonably to protect the particular information at issue could then be addressed by the parties through a motion to compel and opposition to that motion. While we obviously do not wish to encourage such discovery disputes, we believe that the current framework provides ample opportunity for parties to seek more stringent limitations on production of extraordinarily sensitive materials.

45. We will adopt NATA's suggestion that the proposed rule be amended to make clear that when the confidential designation by a producing party is challenged, it is the party claiming confidentiality that bears the burden of proof to establish that the materials are properly designated. This provision is consistent with the FOIA, which places the burden of proof on the party resisting disclosure.[47] We are concerned that disputes of this nature do not dominate discovery and become as time-consuming as the negotiation of private protective agreements has been. Parties should familiarize themselves with the exemptions to disclosure contained in the FOIA, in particular, Exemption 4,[48] which we expect will be the primary basis for invoking our protective rules. We caution parties that their own protective treatment of particular information does not always establish confidentiality under the exemption. Rather, any party seeking to invoke the protective provisions of Section 1.731 should be prepared to demonstrate that release of the information at issue would be likely to cause substantial competitive harm.

46. As proposed in the *NPRM*, we will abandon the requirement that discovered materials be submitted to the Commission. It may be that the public availability of such records could assist other parties contemplating or involved in similar actions against a particular carrier, by clarifying the factual framework surrounding disputed transactions or reducing the need for discovery in other cases. Such a private benefit, however, is not sufficient reason to require routine submission when there are significant benefits both for the producing parties and the Commission in discontinuing this practice. Moreover, the purpose of discovery is to enable individual parties to compile the factual record necessary for the Commission to resolve their individual disputes, not to assist other parties in other disputes. This goal can be accomplished without our routine receipt and maintenance of all discovered materials. We do not need to have immediate access to all such materials in order to resolve a complaint. As explained below, we are adopting rules which would permit the submission of briefs in all cases. These pleadings give parties an opportunity to support their cases by factual evidence gained through discovery and, in turn, provide a full record upon which we can resolve a complaint. We do not have the need or the resources to thoroughly review all discovered materials to ferret out what information may be of decisional significance when briefs summarizing that information may be filed. The complainant bears the burden of proof in presenting facts which demonstrate a violation of the Communications Act or our rules, orders, or policies. Thus, it is incumbent upon the complainant to determine whether discovery has yielded information supporting a claim, and, in its briefs, to present that information to the Commission. Likewise, the defendant's interests are served by presenting and explaining factual information that invalidates complainant's allegations.

47. We do not believe that parties will necessarily be less likely to comply with discovery simply because their responses are not filed with the Commission. The opposing party is the most efficient check on the producing party's compliance: if discovery is not completed satisfactorily, we would expect that a motion to compel would be filed. We thus conclude that it is unnecessary to require parties to submit either certification that discovery has been completed or an explanation as to why not.

F. Other required written submissions (Section 1.732)

48. *Proposal.* We proposed to add to our rules more explicit requirements regarding the briefs filed by parties in formal complaint cases. First, we proposed to retain

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[47] Vaughan v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

[48] Exemption 4 shields, *inter alia*, competitively sensitive business data from the FOIA's disclosure mandate. 5 U.S.C. § 552(b)(4).

current provisions whereby briefs are permitted only when so ordered by the staff. Next, we proposed to codify our current practice of requiring briefs to be filed concurrently by the complainant and defendant. We specified that in cases where discovery had been conducted, initial briefs and reply briefs would be required, while in those cases where discovery was not conducted, only one set of briefs would be submitted. We also proposed to add uniform filing deadlines and page limits for briefs. In cases with discovery, initial briefs would be due within 20 days after the date the staff ordered submission, with reply briefs due within ten days thereafter. The briefs would be limited to 35 and 20 pages, respectively. In cases with no discovery, the single set of briefs would be due within 15 days after the date the staff ordered submission, with each limited to a total of 25 pages. Finally, we proposed that when a brief incorporates material designated as proprietary, a redacted version of the brief omitting all information so designated should be filed with the Commission for inclusion in the public record.

49. *Comments.* Some commenters suggest that, as a fundamental matter, parties should not be dependent upon the staff to order submission of briefs but instead be afforded an absolute right to file briefs, especially in those cases when discovery has been conducted.[49]

50. Two commenters suggest that concurrent filing of briefs could hinder the common identification of pertinent issues; the FCBA likens concurrent briefs to "ships passing in the night."[50] BellSouth suggests that if a concurrent filing schedule is to be maintained, it is especially important to permit reply briefs in all cases, regardless of whether discovery has been conducted. Several parties agree that reply briefs represent a valuable aspect of an adversarial process.[51] Commenters also object to the different deadlines and page limits applied to briefs on the basis of whether the parties engaged in discovery.[52] Parties opposing these provisions assert that legal issues can require as much explanation as factual issues and the parties should not be restricted in bringing their case before the Commission. Allnet recommends a default deadline so that initial briefs would be due 180 days after the date the complaint was filed, unless another deadline is established by the staff. Hirrel suggests that when a brief incorporates material discovered subject to protective provisions, an additional five days should be allowed for submission of the redacted version to the Commission.

51. *Decision.* We are persuaded by commenters in two major respects. First, we agree that when discovery has been conducted, the parties should be accorded an automatic right to file briefs. This establishes the right of parties to expose and explain significant factual information which may not have been available when the initial pleadings were filed. This is especially important in light of the fact that discovered materials will no longer be routinely filed with the Commission. We also acknowledge that in many cases where no discovery has been conducted, it still may be desirable to have legal or jurisdictional issues briefed by the parties. Accordingly, we will also afford parties who have not engaged in discovery the option of filing briefs. Of course, we retain discretion to require submission in any case when we believe briefs to be necessary to our full and fair consideration of the issues.

52. Second, we are convinced that reply briefs should be permitted in all cases, regardless of whether the parties have engaged in discovery. Thus, participants in all cases will have the same opportunity to fully respond to arguments presented by an opposing party.

53. We believe that a default schedule for the submission of briefs holds advantages for both the parties and the staff. Accordingly, in cases where no discovery has been conducted, initial briefs will be due within 90 days after service of a complaint unless the staff orders otherwise. However, when discovery is conducted there are too many possible scenarios to adopt uniform filing deadlines. For instance, a deadline of 30 days from the date that answers to initial interrogatories are due would be appropriate if the interrogatories are answered without objection and no further discovery is sought. However, such a deadline would occur prior to the completion of discovery if objections and related motions to compel are filed, or if a party exercises its right to seek further discovery after the initial interrogatories have been answered. Thus, we believe that when discovery is conducted it would be ineffective to set uniform briefing schedules. In such cases, the staff can continue current practices whereby briefing schedules are set in conjunction with discovery rulings in individual cases. Unless a case presents either unusual complexities or needs for expedition, we would expect that initial briefs will typically be due within 30 days after the completion of discovery. Regardless of whether discovery is conducted, reply briefs will be due within 20 days after the filing deadline for initial briefs.

54. We are adopting Hirrel's proposal that an additional five days be permitted for the submission of redacted briefs to the Commission. Such a provision will not delay the complaint process in any way since it will not affect the deadline for submission of unredacted versions to both the Commission and opposing parties. Redacted versions are submitted to the Commission solely for the purpose of inclusion in the public file. The extra time afforded for filing of redacted briefs should ensure that proper deletions of confidential information are not overlooked in the rush to complete the brief.

55. Finally, to address the concerns expressed by several parties, we will extend the page limits for briefs that were proposed in the *NPRM*. In cases where there has been discovery, initial briefs will be limited to 50 pages; reply briefs to 30 pages. When discovery has not been conducted initial briefs shall not exceed 35 pages; reply briefs 20 pages. We believe that in most cases in which the parties have engaged in discovery, the additional pages are likely to be necessary to discuss both underlying legal issues along with the implications of the factual information elicited through discovery. While the page limits specified above should be sufficient in the majority of cases, parties who believe that their cases require exposition beyond such limits will have the burden of demonstrating that the page limits should be extended. Requests for waiver of page limit provisions must be

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[49] Comments of Pacific Companies at 6; Comments of DC PSC at 2; Reply Comments of Allnet at 5.

[50] Comments of FCBA at 13; Comments of MCI at 11.

[51] *E.g.*, Comments of Ameritech at 5-6; Comments of BellSouth at 3; Comments of FCBA at 4-5; Comments of NATA at 11; Comments of NYNEX at 3-4; Comments of Pacific Companies at 6; Comments of United Video *et al.* at 7-8.

[52] *E.g.*, Comments of BellSouth at 3; Comments of Hirrel at 6.

submitted at least five days before the brief is due and state approximately the number of pages beyond the applicable limit that are requested.

G. Status conference (Section 1.733)

56. *Background.* We proposed to enlarge the purpose of status conferences so that during such meetings with parties, the staff could issue rulings on interlocutory matters pertaining to procedures, discovery, and the submission of briefs.[53] Although such decisions would be recorded in writing after the conference, and served on the parties, each ruling would be effective immediately upon issuance at the conference, unless specified otherwise. Thus, deadlines for compliance would run from the date an oral ruling was delivered. As a related matter, we specifically proposed that motions to compel answers to interrogatories or production of documents be resolved orally, and that any materials that might be ordered to be produced would be due ten days from the date of the oral ruling.[54]

57. *Comments.* Some parties support an expanded use of status conferences to include certain oral rulings by the staff.[55] In fact, one commenter, SWBT, urges us to issue oral rulings on the merits. Several commenters, however, express strong reservations regarding oral rulings and argue that parties should not be required to comply with such rulings until after they are served with written confirmation.[56] They allege that a requirement for immediate effectiveness of oral rulings is at odds with provisions of the Commission's rules, violates both the Administrative Procedure Act (APA) and due process rights, and could result in confusion and misunderstanding. BellSouth contends that the delegation of authority specified in Section 0.291 of the rules extends only to the Bureau Chief, and that any staff rulings are thus prohibited.

58. *Decision.* We believe that oral rulings in status conferences could effect a substantial time savings in the formal complaint process and we are providing for them in our rules. We agree, however, as a policy matter, that compliance deadlines should be calculated from the date of the written confirmation rather than from the oral ruling.[57] Since some type of written decision or recordation of a decision is generally required to trigger appeal rights under our rules,[58] we believe that in order to ensure that parties in formal complaint proceedings are afforded an opportunity to file applications for review it is necessary to modify the *NPRM* proposal so that compliance deadlines are calculated from the date of written confirmation rather than from the date of oral ruling. This change is incorporated in our rules adopted herein.

H. Copies; service; separate filings against multiple defendants. (Section 1.735)

59. *Proposal.* We proposed to revise this procedural rule to clarify fee and filing requirements that have been changed, pursuant to statute, since the formal complaint rules were last revised. Section 8 of the Communications Act was revised to require the collection of fees for a variety of regulatory services provided by the Commission, including the handling of formal complaints. 47 U.S.C. § 158, Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239. Thus, under the Commission's implementing regulations, formal complainants are required to pay a $120 filing fee for each complaint filed. 47 C.F.R. § 1.1105(1)(c). The proposed rule specifies that formal complaints must be filed in accordance with the cited fee regulations and that single complaints against multiple defendants constitute separate actions for which separate fees must be paid.

60. *Comments.* Both the FCBA and U S West support this procedural clarification. However, U S West emphasizes that complaints received without a fee should be returned to the complainant without further consideration by the Commission or service on the defendant. U S West also suggests that complainants should be required to verify or affirmatively state that all required fees have been paid. Finally, the D.C. PSC seeks a determination that it is exempt from the fee requirements applied to formal complainants.

61. *Decision.* The proposed procedural rule will be adopted without modification. It is unnecessary to require parties to attest to the fact that fees have been paid. It is readily apparent to Commission staff reviewing new formal complaints whether or not a fee has been paid and the amount of that fee. It is already our established procedure that complaints are not served, or even assigned a file number, unless fees have been paid. In fact, for purposes of tolling the statute of limitations, we do not consider a complaint to have been properly filed until it has been submitted in accordance with the provisions of Sections 1.1101 *et seq.* *See* 47 C.F.R. § 1.1114(a)(2). Finally, the D.C. PSC, along with other governmental entities, is already exempt from filing fee requirements pursuant to Section 1.1112(f). We believe that it is unnecessary to repeat in the formal complaint rules the various categories of exempted parties that are already listed in the fee rules.

I. Miscellaneous Matters

62. The parties have made a number of suggestions concerning matters that were not specifically addressed in the *NPRM*. First, Allnet recommends that complainants no longer be required to rely on the Commission to

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[53] See proposed Section 1.733. *NPRM*, 7 FCC Rcd at 2049.

[54] *See* proposed Section 1.729(f). *NPRM*, 7 FCC Rcd at 2048.

[55] Comments of GTE at 4; Comments of MCI at 20; Comments of SWBT at 2.

[56] *E.g.*, Reply Comments of Allnet at 3; Comments of Ameritech at 6; Bell Atlantic Comments at 5.

[57] Despite BellSouth's assertions to the contrary, authority delegated to the Chief of the Common Carrier Bureau to act in formal complaint cases can be subdelegated to other "appropriate subordinate officials." 47 C.F.R. § 0.204(b). More than ten years ago authority related to various activities, including certain formal complaint matters, was explicitly delegated from the Bureau Chief to the Enforcement Division. Sub-Delegation of Authority to the Enforcement Division, Order, 46 Fed. Reg. 29755 (1981). While the Bureau no longer has delegated authority to issue orders concluding most complaint proceedings, *see* 47 U.S.C. § 155(c)(1), it continues to have authority to issue interlocutory orders in all complaint cases.

[58] *See* 47 C.F.R. §§ 1.4, 1.115(d). Oral rulings are permitted in hearings, with appeal times running from the date the ruling is delivered in an on-the-record session. 47 C.F.R. § 1.298(b), 1.301(b). Such a provision would be less appropriate in formal complaint cases, however, since status conferences are conducted off the record.

execute service of their complaints but, instead, be permitted to obtain file numbers from the Commission and then serve complaints directly on defendants. Allnet alleges that service delays can run up to 30-60 days after the date a complaint is filed and that complaints would be ripe for resolution at an earlier time if complainants themselves were able to start the clock running through self-service. Although we agree that some time savings could be realized by a system of self-service, we are not adopting Allnet's proposal. In the *1988 Formal Complaints Rules Revision*, the Commission observed that Section 208 of the Communications Act requires that the Commission forward complaints to defendant common carriers. Moreover, other significant factors support a finding that service by the Commission alone is ultimately most efficient. Shortly after receipt, a formal complaint is reviewed by Commission staff to determine whether it states a cause of action under the Communications Act or the Commission's rules, orders, or policies, and otherwise meets our minimal filing requirements. Although this review can normally be completed very quickly, some cases require more detailed analysis. Self-service by the complainant would deprive the Commission of the opportunity to make these threshold judgments. Further, the Commission's other administrative burdens would not be alleviated by self-service since it would still be necessary for the staff to forward to counsel for both parties other information currently included in or with the service notice. Moreover, the delays cited by Allnet are not typical. Service notices are generally issued within ten days after receipt by the staff.

63. MCI suggests that a defendant should be relieved of the obligation to answer a complaint until the Commission rules on any motions to dismiss.[59] Similarly, other parties recommend that discovery be deferred until substantive motions have been decided.[60] The Commission rejected the prospect of discovery deferral in the *1988 Formal Complaints Rules Revision*. At that time, the Commission observed that the exchange of factual information through discovery furthers ultimate resolution or settlement of the case and should not be delayed.[61] In this proceeding, we have attempted to address the proliferation of what we consider to be largely unnecessary or insubstantial motions.[62] It has become almost routine for defendants to file at least one motion to dismiss a complaint. In many instances, such motions actually appear to be seeking denial of the complaint. By postponing pleading and discovery deadlines until the Commission rules on all such motions, defendants would be able to hold proceedings hostage simply by filing certain motions, regardless of whether they are justified by the facts or law. For reasons of economy, we have typically resolved most substantive motions in our final order deciding the merits of a case. However, we have, in the past, altered normal procedures and extended deadlines when a complaint presents significant threshold issues which merit early resolution. But any requirement for separate resolution of individual motions imposes unnecessary and unreasonable constraints on this Commission, especially given the questionable validity of many motions currently filed.

64. Ameritech and WTG propose that parties should be able to obtain admissions of fact as a standard part of the complaint process. They suggest that such admissions are an efficient means of narrowing areas of controversy and are less burdensome than interrogatories as a means of establishing facts. We agree with the parties opposing this proposal, that it is unnecessary and simply adds another area of dispute and layer of delay.[63] Current pleading requirements already provide for an equivalent means of establishing facts. In answering a complaint, a defendant must admit or deny the averments set forth in the complaint or specifically state that it does not have the knowledge or information necessary to form a belief as to the truth of the averment. *See* 47 C.F.R. § 1.724(c). In addition to the ability to develop a factual record through the normal pleading process, our rules explicitly state that the need for obtaining admissions of fact can be addressed in status conferences. 47 C.F.R. § 1.732(a)(3). Any parties believing that such admissions would be beneficial in a particular case can request a status conference to address the matter or move for leave to request admissions from an opposing party. Given our clear authority to require admissions of fact when desirable and the ability to obtain generally equivalent declarations through the normal pleading process, the inclusion of such admissions as a routine element in the formal complaint process is unnecessary.

65. Some parties believe that Administrative Law Judges (ALJs) should be used to a greater degree in formal complaint cases.[64] Various options are suggested, ranging from appointing ALJs to oversee all discovery to designating all cases with any factual dispute for evidentiary hearing before an ALJ. One party contends that such designation is mandatory under the APA.[65] In the *NPRM*, we recognized our authority to order evidentiary hearings in formal complaint cases. *NPRM*, 7 FCC Rcd 2042, 2045 n.10. We do not believe that a new rule need be adopted to set particular guidelines for ALJ involvement in formal complaint cases. Nor do we believe, as is suggested without citation or explanation, that designation to an ALJ is mandatory in every case with any factual dispute. Although formal hearings under the APA are a statutory requirement in certain types of actions,[66] there is no such requirement for formal hearings in formal complaint cases. In fact, Section 208 of the Communications Act specifically confers upon the Commission authority to handle complaints "in any manner and by such means as it shall deem proper." 47 U.S.C. § 208. Under this authority, the Commission has developed procedures for the disposition of complaints principally upon a paper record.

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[59] Reply Comments of MCI at 6.

[60] Comments of NYNEX at 7; Reply Comments of MCI at 12 n.35. *But see*, Reply Comments of Continental at 3; Reply Comments of NATA at 2.

[61] 3 FCC Rcd 1806, 1811.

[62] *NPRM*, 7 FCC Rcd at 2044.

[63] Reply Comments of Allnet at 4; Reply Comments of Pacific Companies at 3.

[64] Comments of Ameritech at 5, 7-8; Reply Comments of Ameritech at 4; Reply Comments of NATA at 5; Comments of Pacific Companies at 7-8. *But see* Reply Comments of BellSouth at 3 n.6 (does not object to use of ALJs but observes that under Ameritech's standards for referral, "virtually all" complaints would go to ALJs).

[65] Comments of Ameritech at 5.

[66] *E.g.*, 47 U.S.C. § 312(c) (revocation of radio license or permit).

In addition, while Section 209 requires a "hearing" in complaint cases awarding damages, it does not require that such a hearing be on the record after opportunity for hearing, i.e., be an adjudicatory hearing under the APA.[67] Accordingly, it has been our practice to designate formal complaints for hearing before an ALJ only when oral testimony or cross-examination is required. *1988 Formal Complaint Rules Revision*, 3 FCC Rcd at 1810.

66. U S West contends that the Commission should freely exercise authority to dismiss all frivolous complaints at the earliest possible time. SWBT, supported by USTA, urges adoption of a rule requiring the immediate dismissal of complaints that allege unreasonably high rates or overearnings when the rates and sharing mechanisms at issue are in compliance with relevant price cap requirements. We agree with WTG that this specific proposal is outside the scope of this proceeding. The formal complaint rules, and our inquiry here, are designed to provide a general framework for the procedures to be followed in handling a wide range of complaints against common carriers, not to set requirements applicable only to a narrow set of disputes.

67. With respect to dismissal of complaints generally, our rules already require that a formal complaint must clearly state facts which, if true, constitute a violation of the Communications Act or an order, rule or policy of the Commission and cite the particular provision which allegedly has been violated. *See* 47 C.F.R. § 1.721(a)(4). The facts should be presented with sufficient explanation and in a manner calculated to clearly advise the Commission and the defendant of the claims being made. 47 C.F.R. § 1.720. More stringent enforcement of these requirements could result in increased dismissals, and we hereby instruct the staff to pay particular attention to such matters in reviewing incoming complaints. However, while some complaints may not be as thoroughly pleaded as we would prefer, most complaints filed with the Commission meet the minimal standards of our rules.

68. We are concerned, however, that in some instances complaints are being lodged with the Commission before the complainant has established the essential facts underlying the action. Specifically, we have discovered a significant number of cases where complainants have sought to recover damages for violations related to the provision of service when, in fact, they never took such service from the defendants.[68] We are unable to summarily dismiss such complaints when they are received since without further pleadings we would have no way of discovering that there is no factual basis for the complaint. Thus, both our resources and those of the defendants must be unnecessarily expended to address a totally baseless claim. Such actions abuse our process and contribute to overall delays in formal complaint resolution. Lawyers who do not confirm the veracity of assertions made in a complaint or responsive pleadings risk possible sanctions including censure, suspension or disbarment from Commission practice. *See* 47 C.F.R. § 1.24.

69. Some parties urge that the formal complaint rules be amended to provide for sanctions against uncooperative or abusive parties.[69] Although the desired range of sanctions are not specified by all parties, some urge the Commission to adopt provisions modeled after Rules 11 and 37(a)(4) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 11, 37(a)(4). Some parties also suggest that attorneys fees should be awarded to prevailing parties, or else an unfair discrepancy exists in the relief that can be obtained, based solely on whether a complainant chooses to bring a claim before the Commission or a federal district court. Although we wish to discourage improper practices by attorneys in formal complaint proceedings, we do not believe that this can be best accomplished through specific sanctions applicable to the formal complaint process. We agree with BellSouth and SWBT that specific sanction rules would inevitably inject new and major controversies to the formal complaint process. It has been our experience that charges of frivolous or abusive practice can be without merit and, in fact, sometimes are themselves interposed for frivolous or abusive purposes. We fear that specific sanction rules would only encourage such charges and require our involvement in disputes that will prolong ultimate resolution of the underlying complaint. We believe that inclusion of specific sanctions applicable only in the formal complaint context is unnecessary given our broad sanction authority under existing rules.[70] The fact that there is no provision in the formal complaint rules for the recovery of attorneys fees is but only one of several significant differences between the forums available for resolution.[71] Parties are free to weigh the advantages in bringing their claims in federal district court against the benefits of Commission resolution. *See* 47 U.S.C. § 207.

70. U S West, supported by other commenters,[72] suggests that we add to the formal complaint rules a provision modeled after the federal pre-trial procedures contained in Rule 16 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 16. Under U S West's plan, an early conference would be held to discuss issues in dispute, the need for discovery and briefing, and anticipated motions. At the conference, the staff would set a schedule for procedural actions individually tailored to the particular complexities of the individual complaint. The Commission already has a rule designed to encompass many of the functions covered by Rule 16. Section 1.732 of our rules was clearly modeled after Rule 16, but adapted to the formal complaint context where trials are not held. Further, although we support the increased use of status conferences for defining issues and resolving interlocutory matters, we believe that it would be burdensome for the staff to have to set separate procedural schedules for each

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[67] We note that written procedures before the Commission may satisfy the APA hearing requirements. *See* 5 U.S.C. § 556(d).

[68] *See e.g.*, LDDS Communications, Inc. v. Contel of Arkansas *et al.*, File Nos. E-90-236 - E-90-244, 7 FCC Rcd 4212 (Com. Car. Bur. 1992); LDDS Communications, Inc. v. Carolina Telephone and Telegraph Co. *et al.*, File Nos. E-90-248 - E-90-253, 7 FCC Rcd 4296 (Com.Car.Bur. 1992); NTS v. GTE Southwest, Inc., File No. E-91-055, 7 FCC Rcd 1988 (Com.Car.Bur. 1992).

[69] Comments of Ameritech at 9; Comments of United Video *et al.* at 16-18; Comments of WTG at 4-5.

[70] 47 C.F.R. § 1.24.

[71] We also note we lack authority to require the payment of attorneys fees. *See Turner v. FCC*, 514 F.2d 1354 (1975).

[72] Reply Comments of Pacific Companies at 2; Reply Comments of United Video *et al.* at 3 n.2

complaint. We believe that the objectives sought by U S West can be realized under our existing rules, as amended here.

IV. CONCLUSION

71. With this *Report and Order*, we adopt rules designed to improve the records compiled in formal complaint cases and expedite resolution of such cases. Specifically, we are adopting rules which should ensure the confidentiality of materials exchanged through discovery. We have both established an absolute right to file briefs and set uniform standards applicable to such pleadings. We have also discontinued certain unnecessary pleadings and authorized the staff to issue oral rulings on interlocutory matters.

V. ORDERING CLAUSES

72. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 201(b), 208 and 403 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 201(b), 208 and 403, that Section 1.720 *et seq.* of the Commission's rules, 47 C.F.R. § 1.720 *et seq.* IS AMENDED as set forth in Appendix B.

73. IT IS FURTHER ORDERED that this *Report and Order* will be effective ninety (90) days after publication of a summary thereof in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

List of Commenters in CC Docket No. 92-26

Comments

1. American Telephone and Telegraph Company (AT&T)
2. Ameritech Operating Companies (Ameritech)
3. Allnet Communication Services, Inc. (Allnet)
4. BellSouth Corporation and BellSouth Telecommunication, Inc. (BellSouth)
5. Bell Atlantic Telephone Companies (Bell Atlantic)
6. Central Telephone Company (Centel)
7. Continental Mobile Telephone Company, Inc. (Continental)
8. Federal Communications Bar Association (FCBA)
9. GTE Service Corporation (GTE)
10. Michael J. Hirrel (Hirrel)
11. MCI Telecommunications Corporation (MCI)
12. The North American Telecommunications Association (NATA)
13. NYNEX Telephone Companies (NYNEX)
14. Pacific Bell and Nevada Bell (Pacific Companies)
15. The Public Service Commission of the District of Columbia (DC PSC)
16. Southwestern Bell Telephone Company (SWBT)
17. Sprint Communications Company L.P. (Sprint)
18. U S West Communications, Inc. (U S West)
19. United Video, Inc.; Superstar Connection; Southern Satellite Systems, Inc.; Netlink USA; Eastern Microwave, Inc. (United Video *et al.*)
20. Williams Telecommunications Group, Inc. (WTG)

Reply Comments

1. Ameritech
2. Allnet
3. BellSouth
4. MCI
5. NATA
6. Pacific Companies
7. SWBT
8. Sprint
9. United States Telephone Association (USTA)
10. United Video *et al.*
11. WTG

APPENDIX B

RULES ADOPTED

Part 1 of Title 47 of the Code of Federal Regulations is amended to read as follows:

Part 1 - Practice and procedure

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. In § 1.720, paragraph (i) is added to read as follows:

§ 1.720 General pleading requirements.

* * * * *

(i) All statements purporting to summarize or explain Commission orders or policies must cite, in standard legal form, the Commission ruling upon which such statements are based.

3. In § 1.724, paragraph (e) is added to read as follows:

§ 1.724 Answers.

* * * * *

(e) Affirmative defenses to allegations contained in the complaint shall be specifically captioned as such and presented separately from any denials made in accordance with paragraph (c) of this section.

4. Section 1.726 is revised to read as follows:

§ 1.726 Replies.

Within 10 days after service of an answer containing affirmative defenses presented in accordance with Section 1.724(e), a complainant may file and serve a reply, which shall be responsive to only those allegations contained in affirmative defenses.

5. In § 1.727, paragraph (e) is revised to read as follows and paragraph (f) is added to read as follows:

§ 1.727 Motions.

* * * * *

(e) Oppositions to motions may be filed within ten days after the motion is filed. Oppositions shall be limited to the specific issues and allegations contained in the motion; when a motion is incorporated in an answer to a complaint, an opposition to the motion shall not address any issues presented in the answer that are not also specifically raised in the motion.

(f) No reply may be filed to an opposition to a motion.

6. In § 1.729, paragraphs (a) and (d) are revised, the last sentence of paragraph (c) is revised, and new paragraph (e) is added to read as follows:

§ 1.729 Interrogatories to parties.

(a) During the time period beginning with service of the complaint and ending 30 days after the date an answer is due to be filed, any party may serve any other party written interrogatories, to be answered in writing by the party served or, if the party served is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. All interrogatories served on an opposing party shall be filed with the Commission at the time of service. Parties shall propound no more than 30 single interrogatories without prior Commission approval. Subparts of an interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. This procedure may be used for the discovery of any nonprivileged matter which is relevant to the pleadings. Interrogatories may not be employed for the purpose of delay, harassment or to obtain information which is beyond the scope of permissible inquiry relating to the subject matter of the pleadings.

* * * * *

(c) * * * Alternately, the party may request that answers to interrogatories be discussed during a status conference, pursuant to § 1.733.

(d) Answers to interrogatories shall not be filed with the Commission unless so ordered by the Commission or its staff.

(e) The Commission may in its discretion limit the scope of permissible inquiry so that matters pertaining solely to the amount or computation of damages are not addressed until after a finding of liability has been made against the complainant. Inquiries that relate dually to liability and damages will be permitted during initial discovery conducted during the liability phase. If a bifurcated framework is implemented and a finding of liability is made, the parties shall, within 5 working days, inform the Commission whether they wish to defer damages discovery in order to enter negotiations for the purpose of settling their dispute. If the parties commence settlement negotiations, damages discovery shall not be undertaken prior to 20 days after release of the liability order.

7. In § 1.730, paragraph (c) is revised and paragraph (d) is added to read as follows:

§ 1.730 Other forms of discovery.

* * * * *

(c) Motions seeking discovery may be filed only during the period beginning with the service of a complaint and ending 30 days after the date an answer is filed or 15 days after responses to interrogatories under § 1.729 are filed, whichever period is longer, except where the movant demonstrates that the need for such discovery could not, even with due diligence, have been ascertained within this period.

(d) Documents produced through discovery shall not be filed with the Commission unless so ordered by the Commission or its staff.

8. Sections 1.731 through 1.734 are redesignated as §§ 1.732 through 1.735 and new § 1.731 is added to read as follows:

§ 1.731 Confidentiality of information produced through discovery.

(a) Any materials generated or provided by a party in response to discovery may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(1) - (9). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(b) Materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(1) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(2) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

(3) Consultants or expert witnesses retained by the parties;

(4) The Commission and its staff; and

(5) Court reporters and stenographers in accordance with the terms and conditions of this section.

These individuals shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other

than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information shall sign a notarized statement affirmatively stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(c) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraph (b) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(d) Upon termination of a formal complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

9. In newly redesignated § 1.732, the last sentence of paragraph (a) is added; paragraph (b) is redesignated and republished as paragraph (g); and new paragraphs (b), (c), (d), (e), and (f) are added to read as follows:

§ 1.732 Other required written submissions.

(a) * * * Absent an order by the Commission that briefs be filed, the parties may voluntarily submit briefs in accordance with the provisions of paragraphs (b) - (e) of this section.

(b) In cases when discovery is not conducted, briefs shall be filed concurrently by both complainant and defendant within 90 days from the date a complaint is served. Such briefs shall be no longer than 35 pages.

(c) In cases when discovery is conducted, briefs shall be filed concurrently by both complainant and defendant at such time designated by the staff, typically within 30 days after discovery is completed. Such briefs shall be no longer than 50 pages.

(d) Reply briefs may be submitted by either party within 20 days from the date initial briefs are due. Reply briefs shall be no longer than 20 pages in cases when discovery is not conducted, and 30 pages in cases when discovery is conducted.

(e) Briefs containing information which is claimed by an opposing or third party to be proprietary under § 1.731 shall be submitted to the Commission in confidence pursuant to the requirements of Section 0.459 of this chapter and clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall also be filed with the Commission for inclusion in the public file. Edited versions shall be filed within five days from the date the unedited brief is submitted, and served on opposing parties.

(f) Either on its own motion or upon proper motion by a party, the Commission may establish other deadlines or page limits for briefs.

(g) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including affidavits and exhibits.

10. In newly redesignated § 1.733, paragraph (a) introductory text is republished; paragraphs (a)(5) and (b) are revised; paragraphs (c) and (d) are redesignated as paragraphs (d) and (e), respectively; and new paragraph (c) is added to read as follows:

§ 1.733 Status conference.

(a) In any complaint proceeding, the Commission may in its discretion direct the attorneys and/or the parties to appear before it for a conference to consider:

* * * * *

(5) The necessity and extent of discovery, including objections to interrogatories or requests for production of documents;

* * * * *

(b) While a conference normally will be scheduled after the answer has been filed, any party may request that a conference be held at any time after the complaint has been filed.

(c) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of interlocutory matters relevant to the conduct of a formal complaint proceeding including, *inter alia*, procedural matters, discovery, and the submission of briefs or other evidentiary materials. These rulings will be promptly memorialized in writing and served on the parties. When such rulings require a party to undertake affirmative action not subject to deadlines established by another provision of this subpart, such action will be required within 10 days from the date of the written memorialization unless the staff designates a later deadline.

* * * * *

11. In newly redesignated § 1.735, paragraph (b) is revised to read as follows:

§ 1.735 Copies; service; separate filings against multiple defendants.

* * * * *

(b) The complainant must file an original plus three copies of the complaint, accompanied by the correct fee, in accordance with Subpart G of this Part of the Rules. See 47 C.F.R. § 1.1105(1)(c). However, if a complaint is addressed against multiple defendants, complainant shall pay separate fee and supply three additional copies of the complaint for each additional defendant.

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-198

In re Applications of

EDWARD F. and PAMELA J. LEVINE	File No. BPH-900514MM
MAURICE F. A. BATTISTI	File No. BPH-900515ME
MARY C. MURRAY	File No. BPH-900516MT
CAROL A. MORGAN	File No. BPH-900516MU

For Construction Permit for a
New FM Station on Channel 298A,
Endwell, New York

Appearances

James L. Oyster on behalf of Edward F. and Pamela J. Levine; *Arthur V. Belendiuk, Robert W. Healy,* and *J. Daniel Gillick* on behalf of Maurice F. A. Battisti; *Stephen C. Simpson* on behalf of Mary C. Murray; and *J. Brian DeBoice* on behalf of Carol A. Morgan.

DECISION

Adopted: March 31, 1993; Released: April 16, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE

Board Member GREENE:

1. The Review Board has before it the *Initial Decision* of Administrative Law Judge Joseph P. Gonzalez, 7 FCC Rcd 4084 (1992), granting the application of Carol A. Morgan for a new FM broadcast station in Endwell, New York, and denying the competing applications of Edward F. and Pamela J. Levine, Maurice F. A. Battisti, and Mary C. Murray. The Administrative Law Judge decided the case under the standard comparative criteria set forth in *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965) (*Policy Statement*). He assessed no demerits under the factor concerning diversification of control of the media of mass communications, and he awarded each applicant full credit for proposing to integrate the owner or owners into management. He found that the decisional difference between the applicants was in the quality of their proposed integration, specifically in their local residence and civic participation, and he concluded that Morgan's past local residence in the service area and her civic participation, coupled with her promise to move to the community of license if awarded the permit, were superior to the integration enhancements offered by the other applicants. Each of the losing applicants excepts to this *Initial Decision,* arguing that the ALJ improperly handled the comparative enhancement factors and erred in denying motions to add qualifying issues against Morgan. Morgan supports the *Initial Decision* and further argues that Murray receive too much integration credit and should have been examined on her finances. The Levines seek a real-party-in-interest issue against Battisti. After reviewing the record along with the exceptions and replies filed by the parties,[1] the Review Board is granting Battisti's application without further hearing.

COMPARATIVE EVALUATION

2. This case turns on a comparison of the applicants under the integration criterion of the *Policy Statement,* 1 FCC 2d at 395-96, which is considered to be a factor of substantial importance. Each applicant claims full time integration as general manager, and three of the applicants, Battisti, Murray, and Morgan, claim this integration is enhanced by the applicant's familiarity with the community as demonstrated by continuous long term residence in the service area and civic activities. The Levines claim their proposal is enhanced by their promise to move to the community of license and by their past broadcast experience.

3. Murray's claim of 100% quantitative credit for her management proposal is challenged because, during her deposition, she testified she planned to perform personally many time-consuming non-managerial duties and, while recanting somewhat at the hearing, she continued to say she would perform enough non-managerial jobs for her opponents to question her proposal. Under the 1965 *Policy Statement,* the Commission said it will "look to the positions which the participating owners will occupy, in order to determine the extent of their policy functions and the likelihood of their playing important roles in management." 1 FCC 2d at 395. The general manager position proposed for herself by Murray is accorded "particular weight" in the Commission's assessment of an integration proposal when that position is held by an owner. *Id.* Murray is the sole owner and the ultimate decision-maker at the station, 7 FCC Rcd at 4088 ¶ 47, with no outside business interests to distract her from this responsibility.[2] The ALJ found that she "has played a

[1] The Board has the following pleadings before it: Exceptions to Initial Decision filed July 24, 1992 and Reply Exceptions to Initial Decision filed August 11, 1992 by Mary C. Murray; Exceptions of Edward F. and Pamela J. Levine filed July 27, 1992 and Reply Exceptions of Edward F. and Pamela J. Levine filed August 10, 1992; Exceptions and Brief of Maurice F. A. Battisti filed July 27, 1992 and Reply Exceptions of Maurice F. A. Battisti filed August 11, 1992; and Brief in Support of Initial Decision and Contingent Exceptions filed July 27, 1992 and Reply to Exceptions filed August 11, 1992 by Carol A. Morgan. Battisti also filed a Request for Oral Argument on August 13, 1992, which is being denied pursuant to *Proposals to Reform the Commission's Comparative Hearing Process,* 6 FCC Rcd 157, 163 (1990) (subsequent history omitted), and 47 CFR 1.277(c) directing the Board to forgo oral argument where argument would not lend valuable assistance in resolving the issues before it.

[2] Morgan's reference to cases requiring applicants with significant outside interests to demonstrate their commitment to the

significant role in prosecuting her application, and there is no reason to believe she would not assume a similar degree of responsibility with respect to the running of her proposed station." *Id.* at ¶ 46. Although her opponents argue that her management time will be compromised if she handles other tasks, nothing in the record suggests that she has or will exercise anything less than the ultimate authority at the station or that she will be involved on less than a full-time basis. Under these circumstances, her integration proposal is not discredited because she also will perform non-management tasks. *See Sunbelt, Limited Partnership*, 8 FCC Rcd 753, 754 n.10 (1993) (owners planning to spend significant time performing nonmanagerial duties will receive full credit as long as they will also perform sufficient managerial duties); *Helen Broadcasters, Inc.*, 7 FCC Rcd 2501, 2503 ¶ 13 (Rev. Bd.) ("such a blend of activities is a realistic mix for a general manager of a fledgling radio station with a staff of four"), *rev. denied*, 7 FCC Rcd 6844 (1992),[3] and cases cited therein.[4] In contrast, as exemplified by the cases on which Morgan relies for a contrary conclusion, a principal with less than ultimate control must show participation in station decision-making before receiving integration credit. *See Vela Broadcasting Co.*, 2 FCC Rcd 3663, 3667 ¶ 19 (Rev. Bd. 1987) (the inquiry is "whether the other owners play true and actual roles in management"). Principals proposed for positions not normally considered to be management have not received credit when they could not make that showing.[5]

4. Because each of the applicants is entitled to 100% quantitative integration credit and there are no meaningful distinctions among the applicants under other comparative criteria, the weight of the qualitative enhancements for local residence and civic activities has decisional significance. We are guided by the *Policy Statement* in weighing the enhancements:

> Generally speaking, residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future residence (which is expected to accompany meaningful participation) will also be accorded less weight than present residence of several years' duration.

1 FCC 2d at 396. The only exception to the policy that local residence is entitled to superior credit is a narrow one for residence in a community contiguous to the principal community, and that exception has been said to apply only when the community of license is essentially inseparable from the residential community. *Joe L. Aldridge*, 6 FCC Rcd 994, 995 (Rev. Bd. 1991); *Richardson Broadcasting Group*, 5 FCC Rcd 6364, *reaffirmed*, 5 FCC Rcd 6964 (Rev. Bd. 1990), *reversed and remanded on other grounds*, 7 FCC Rcd 1583 (1992). Battisti seeks credit under this exception because, he says, Endicott where he lives is contiguous to Endwell--and closer than Binghamton, the community where Morgan and Murray live. No hearing evidence shows the relationship of Endicott to Endwell, but in his proposed findings Battisti asked the ALJ to take official notice of the contiguity from a map submitted with the engineering section of his application. The ALJ refused, in part because he viewed this post-hearing claim to credit as comparative upgrading and, in part, because "Mr. Battisti has not shown [consistent with Fed. R. Evid. 201(b)] that the alleged contiguity is capable of accurate and ready determination by reference to sources whose accuracy cannot reasonably be questioned." 7 FCC Rcd at 4087 ¶ 41. The Board will deny this exception for, even if the claim were timely and the map acceptable evidence, the map does not clearly show the claimed contiguity. Thus, it would not be sufficient to meet Battisti's burden of showing that his residence is

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station by demonstrating how they will accommodate their outside interests is of no relevance here. Ms. Murray's commitment to her proposed station is not at issue and she need not parse every minute of her time at the station in order to show the credibility of her integration proposal. She has identified who will be in charge: herself, and what her job will be: general manager. That she will roll up her sleeves and do what has to be done to make the station work with a small staff rather than hire additional staff for the sole purpose of segregating "management" from "nonmanagement" tasks does not undermine her integration proposal. *Cf. Sarasota-Charlotte Broadcasting Corp. v. FCC*, 976 F. 2d 1439, 1442 (D.C. Cir. 1992) ("what counts for purposes of determining an applicant's integration credit is . . . who will actually manage and supervise the overall operation of the station").

[3] Murray testified she plans to hire four full-time employees in addition to herself. She plans to hire part-time sales persons and disc jockeys. Tr. 159-64. Comparable information is not available from the other applicants.

[4] Murray's opponents also argue that her proposal is unrealistic or distinguishable from *Helen* because she lacks broadcast experience. The Commission has said that emphasis on past experience "could discourage qualified newcomers to broadcasting" and, for this reason, has deemed it of only "minor significance" when weighing integration enhancements. *Policy Statement*, 1 FCC 2d at 396. Treating inexperience as a reason for denying integration credit entirely would be inconsistent with the Commission's view that this should not be a bar to entry. In the Commission's view, "experience generally confers only an initial advantage" to a broadcaster, and the lack is remediable. *Id.* at 396 & n.8. Lack of experience is not equated with inability to effectuate an integration pledge. *See Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 950-52 (Rev. Bd. 1982).

[5] Principals could not make the showing in the cases on which Morgan relies. *See Doylan Forney*, 5 FCC Rcd 5423, 5426 ¶ ¶ 22-23 (1990) (25% shareholder with no specific role other than to advise or assist managers) (subsequent history omitted); *Payne Communications, Inc.*, 1 FCC Rcd 1052, 1057 ¶ 26 (Rev. Bd. 1986) (47% shareholder with minor management responsibility that was merely incidental to principal role as office manager of one applicant, and joint owner of another applicant who was to be office manager; both were married to the proposed general managers of their applicants) (subsequent history omitted); *Ft. Collins Telecasters*, 103 FCC 2d 978, 987-88 (Rev. Bd. 1986) (25% owner heading accounting department); *Makai Broadcasting, Inc.*, 102 FCC 2d 322, 324 (Rev. Bd. 1985) (25% shareholder occupying positions not normally deemed managerial); *Apogee, Inc.*, 99 FCC 2d 979, 987 (Rev. Bd. 1985) (25% shareholder in office manager position) (subsequent history omitted); *Vacationland Broadcasting Company, Inc.*, 97 FCC 2d 485, 493-94 (Rev. Bd. 1984) (15% shareholder who would be traffic director, treasurer, bookkeeper, and salesperson) (subsequent history omitted); *Bradley, Hand, and Triplett*, 89 FCC 2d 657, 659, 661 (Rev. Bd. 1982) (general manager's wife was to be "administrative assistant" with no management function other than making major management decisions jointly with the general and station managers).

entitled to the slightly heightened credit available for residence in the community of license. *See Aldridge* at 995. Furthermore, even if Endicott is closer to Endwell than the community where Murray and Morgan live, the Commission has not recognized a sliding scale of credit based on the number of miles one lives from the principal community. The only additional credit beyond the credit recognized for service area residence is that discussed above for residence in contiguous or adjacent communities.

5. Murray has lived in the service area the longest of any of the applicants. -- "since approximately 1935." 7 FCC Rcd at 4085 ¶ 24, 4089 ¶ 55. Battisti has lived there since 1942. *Id.* at 4085 ¶ 19. Morgan has lived there since 1973 and has promised to move to the principal community if awarded the permit. *Id.* at 4089 ¶ 55; Morgan Exh. 1, pp. 2-3. The Levines are outsiders who promise to move to Endwell if granted the permit. *Id.* at 4085 ¶¶ 10, 13. In comparing the applicants' residence showings, the ALJ found the Levines' proposal inferior because they had no current residence, and he gave them no further consideration.[6] *Id.* at 4088 ¶ 54. He found Murray's proposal inferior to those of Battisti and Morgan because she did not explicitly pledge to remain a resident of the service area, whereas Battisti said he would continue living in the same place and Morgan promised to move to the community of license. *Id.* at 4089 ¶ 56. Murray excepts, arguing that the ALJ erroneously diminished her credit and overvalued Morgan's for her promise to move to Endwell. Murray explains she did not promise to move because she has lived in the service area throughout her life and in the same house for the past fifteen years. Further, "A reasoned reading of the Commission's *Policy Statement* leads to the conclusion that individuals who currently live in the service area have created a rebuttable presumption that, should they propose to work at the station, they intend to maintain their current residence in the service area." Murray Exceptions at 24-25. Morgan disagrees, relying only on the initial decision in *Scottsdale Talking Machine and Wireless Co.*, 6 FCC Rcd 1668, 1674-75 (ALJ 1991). But, the affected applicant was not before the Board on review, and decisions of administrative law judges are not binding precedent on the Commission if not reviewed. *Rockland Broadcasting Co.*, 2 RR 2d 820, 823 n.3 (1964); *Finalization of Initial Decisions*, 20 RR 1141 (1961).[7] Morgan further argues that there must not be any rebuttable presumption because applicants routinely include future residence in their integration statements, but in the ALJ initial decisions cited as examples for this proposition, only some of the service areas residents proposing integration made this pledge to stay in the same location, and in none of the cases was it decisional in the initial decision or even considered on review.[8] A local resident's failure to make a specific promise *not* to change her circumstances by moving does not render the applicant's showing inferior to that of other applicants with similar attributes, unless record evidence suggests that the applicant's current residence may not be permanent.[9] On the other hand, a promise like Morgan's to move to the community of license from the service area is entitled to some additional credit, although the amount of recognition is only slight. As is clear from the *Policy Statement* at 396, credit for service area residence closely follows credit for residence in the principal community and future residence is accorded less weight than long term current residence. *See Great Lakes Broadcasting, Inc.*, 7 FCC Rcd 1829, 1831 ¶ 12, *recon. denied*, 7 FCC Rcd 6548 (Rev. Bd. 1992); *McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7273 ¶ 18 (Rev. Bd. 1990),, *review denied*, 6 FCC Rcd 2347 (1991).

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[6] We agree with the ALJ that the Levines' comparative position under the integration criteria of the *Policy Statement* is weak and cannot prevail in this proceeding. The Levines agree with this analysis but argue summarily that the Commission should modify the criteria to favor applicants like themselves who have significant broadcast experience rather than applicants with an understanding of local needs and interests developed from local residence or civic activities, which the *Policy Statement* emphasizes and the other remaining applicants have. Following the decision in *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992), in which the court questioned the Commission's comparative criteria in light of intervening changes in other Commission policies, the Commission issued *Re-examination of the Policy Statement*, 7 FCC Rcd 2664 (1992), but stated its intention to rely on the *Policy Statement* for pending cases, 7 FCC Rcd at 2669, 2672 n.17; *Anchor Broadcasting Limited Partnership*, 7 FCC Rcd 4566, 4568 (1992), *reaffirmed*, FCC 93-115, slip op. at 3 ¶ 18, released March 10, 1993. *See William L. Carroll*, FCC 93-55, released February 5, 1993 (applicant prevails for stronger "integration"). The Levines understand the Board is without authority to change Commission policy; they are merely preserving the argument for possible presentation to the Commission. Because the Levines cannot prevail here, there is no need to determine whether the ALJ should have given them a comparative demerit for what Morgan characterizes as a contingent commitment to divest their attributable media interests. They said they would divest if they are awarded the Endwell construction permit in "a comparative proceeding."

[7] The ALJ's initial decision does stand as the agency's decision in the particular case, however. *Finalization of Initial Decisions; see Rayne Broadcasting Company, Inc.*, 5 FCC Rcd 3350, 3352 ¶ 18 (Rev. Bd. 1990).

[8] *See Gary Sellers*, 7 FCC Rcd 2472 (ALJ), *aff'd sub nom. B & G Broadcasting, Inc.*, 7 FCC Rcd 4977 (Rev. Bd. 1992); *Eve Ackerman*, 6 FCC Rcd 5277 (ALJ 1991), *reversed on other grounds*, 7 FCC Rcd 2493 (Rev. Bd.), *review denied*, 7 FCC Rcd 6872 (1992); *Emision de Radio Balmeseda, Inc.*, 6 FCC Rcd 5239 (ALJ 1991), *remanded on other grounds*, 7 FCC Rcd 3852 (Rev. Bd. 1992). Morgan also cites by analogy to *Woods Communications Group, Inc.*, 7 FCC Rcd 78, 80, *recon. denied*, 7 FCC Rcd 4604 (1992), where the Commission denied integration credit to a school teacher who had not stated her intention to leave her teaching position. But the case is distinct for, in *Woods*, the Commission would not presume a change in status without an affirmative showing, whereas Morgan would have the Board presume that Murray will change her status because she has made no showing. A more analogous case is *Vela Broadcasting Co.*, 2 FCC Rcd 3663 (Rev. Bd. 1987), where the permanence of a partnership was presumed even though not explicitly provided for in the partnership agreement. In *Coastal Broadcasting Partnership*, 7 FCC Rcd 1432 (1992), applicants with past service area residence credit also received credit for promises to move to the community of license. *Id.* at 1435 ¶ ¶ 20, 21. Neither the Commission nor the ALJ in the underlying *Initial Decision*, 4 FCC Rcd 2345 (1989), diminished the credit of long term service area residents who did not address their future residence plans.

[9] When implementation of an integration promise depends on moving, however, applicants should continue to state their intentions in their integration showings. And, a local resident's intention to move from the area must be disclosed so that the impact on integration can be evaluated.

6. Battisti and Murray also claim that the ALJ undervalued their residence credit by not giving sufficient weight to their substantially longer residence in the service area than Morgan's. All three applicants have lived in the service area long enough to indicate "a likelihood of continuing knowledge of changing local interests and needs." *Policy Statement* at 396. If this were the only consideration, Murray would have the advantage over Morgan because of her longer term service area residence, and Battisti would be a close second. *See Ronald Sorenson*, 6 FCC Rcd 1952, 1953 ¶ 6 (1991), citing *Vacationland Broadcasting*, 97 FCC 2d at 496. Murray has lived in the area thirty-eight years longer than Morgan; Battisti, thirty years longer. Although the significance of differences diminishes among long term residents, *see Naguabo Broadcasting Co.*, 6 FCC Rcd 4879, 4880 ¶ 9 (1991) (credit diminished for residence remote in time or during childhood and adolescence), *modified on other grounds*, 7 FCC Rcd 1696 (1992); *Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485, 4485 ¶ 2 (1991) (although less important for long term residents, residence differential still a "marginal plus"),[10] the difference here is not overcome by Morgan's promise to move in the future because of the higher premium placed on current long term residence than on a promise for the future. *See generally Rebecca L. Boedker*, 6 FCC Rcd 2557, 2558-59 (1991) (applicant's 60 year service area residence given more weight than competitor's 30 year residence in the service area and principal community).

7. The inquiry is not limited to length of residence, however. An important consideration in evaluating the applicants' enhancement under the overall local area familiarity factor is the participation of the applicants in civic activities in the community of license and the service area, for such participation is considered a barometer of the integrated principal's empirical "knowledge of and interest in the welfare of the Community." *Policy Statement* at 396; *see Ronald Sorenson*, 6 FCC Rcd at 1952-53 ¶ 5; *Newton Television Limited*, 3 FCC Rcd 553, 555 ¶ 9 (Rev. Bd. 1988) (subsequent history omitted). The ALJ rejected Battisti's showing for his failure to make a general statement that his activities occurred within the proposed service area and for failing to indicate how much time he devoted to them. 7 FCC Rcd at 4087 ¶ 42. But, as Battisti points out in his exceptions, he did give locations for some of the activities, and he indicated the years of his participation in each, although not the extent of his participation in annual hours as provided in the Murray and Morgan exhibits.[11] We are granting this exception in part, for Battisti is entitled to credit for involvement with organizations or activities located within the proposed service area or shown to impart knowledge of it. *See The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437, 6441 ¶ ¶ 18-19 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 3712 (1990). Where it is clear from the record that the communities are within the service area,[12] denial of credit would be an elevation of form over substance that would be inconsistent with the overall record. But, Battisti is not entitled to credit for organizations or activities outside the service area or for those whose nexus to the service area cannot be discerned from the record. He bears the burdens of proceeding and non-persuasion, *see Beach Broadcasting Limited Partnership*, 6 FCC Rcd 885, 886 (Rev. Bd.), *aff'd*, 6 FCC Rcd 4485 (1991), and the Board will not develop his evidence for him. *Cf. Bible Broadcasting Network, Inc.*, 7 FCC Rcd 432, 433 n.3 (Rev. Bd.) ("The Board has no obligation to fashion arguments for parties"), *rev. denied*, 7 FCC Rcd 4578 (1992).

8. Apart from his short stint as an assistant Boy Scout Master in 1959 and his church membership, Battisti has been continuously involved in civic activities since 1966, when he was Broome County Community Ambassador to Ceylon and India. He is a member of the Broome Community College Alumnae Association (since 1966 and President, Vice President, or Director from 1987 to 1990); a member of the Endicott Kiwanis Club (since 1972 and President or Vice President from 1985-88); a member of the Friendship Force of Binghamton (since 1984 and President, 1989-present); a Director of the Girls Club of Western Broome County (since 1987); a member of the Endicott Republican Committee (since 1987 and Chairman since 1988); and a Board Member of the Endicott Community Memorial Center (since 1988). He was a member of the Broome County Young Republican Club from 1966 to 1972 and its President in 1968; Vice President of the Endicott Jaycees in 1969; and a member of the Endicott Development Association in 1989-90 and an Advisory Board member in 1989. He has been a church member since 1942 and a lector from 1966-75 and again since 1988. 7 FCC Rcd at 4085 ¶ 19; Battisti Exh. 2. Battisti also claims to have founded Kiwanis clubs in several communities in 1990 and 1991. However, the record does not establish that all are in the proposed service area,[13] and, even if they are, activities contemporaneous with or subsequent to the filing of the application are given only minimal weight, at best, because of the Commission's concern about comparative upgrading. *Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2297

[10] Morgan's argument that there is no material difference between the applicants' residence in the area, Reply to Exceptions at 21 and n.50, distorts the Commission's view expressed in this line of cases that length of residence is a distinction, albeit a marginal one when long-term residents are being compared.

[11] Murray estimated the number of hours she spent per activity each year. Morgan estimated the average number of hours spent on all activities each year and explained that the actual number of hours could be more or less in any given year. *Cf. Eugene Walton*, 7 FCC Rcd 3237, 3239 n.9 (1992) (applicant's civic activities credited even though specific dates of involvement not given).

[12] The Board is crediting Battisti with activities in Endicott and Binghamton, communities conceded by the applicants to be within the service area with respect to residence credit, and in Broome County, which is substantially served by Battisti's proposed station. We note that Murray claimed credit for participation in at least one Broome County organization. To say that activities in these locations have not been shown to be within the service area is disingenuous, at best.

[13] In her Reply to Exceptions at 18, Morgan complains, "Battisti *continues* to claim civic participation credit for activities which his own direct case testimony associates with locations that are *beyond* his predicted service area -- locations such as

(1991), *recon. dismissed*, 7 FCC Rcd 674 (1992), *appeal pending sub nom. Appledore Communications, Inc. v. FCC*, No. 92-1079 (D.C. Cir. filed Feb. 12, 1992).[14]

9. Murray's activities apart from church attendance date back to 1960. She was active in Republican political organizations from 1960 to 1984. Since 1975 she has done door-to-door fundraising for a total of five eleemosynary organizations, soliciting on average for two organizations a year, and she has twice been district captain.[15] She was a school mother and member of the Parent Teachers Association for all but two years between 1964 and 1970. She is a member of the Monday Club (since 1980) and the SUNY Binghamton Foundation (since 1988), primarily attending speeches sponsored by each. She also was a Mansion Guide showing children through the Roberson Center for the Arts (1970-72), a Cub Scouts Den Mother (1970-72), and a Girl Scouts field trip chaperon (1968-69). She has been a church member since 1954 and appears to have been attending regularly since 1988. 7 FCC Rcd 4085-86 ¶ ¶ 24-25; Murray Exh. 1; Tr. 132, 140, 149, 154-55. Murray also claims credit for her memberships in the Broome County Historical Society and the Roberson Center for the Arts and her special events committee work with the United Health Services Foundation, but these affiliations began after she filed her application, Murray Exh. 1, pp. 4-5, Tr. 132, 140, and so are entitled to minimal credit, at best. *Colonial Communications*, 6 FCC Rcd at 2297 § 11. Murray claims credit for attending performances of the Binghamton Symphony/Tri Cities Opera and making financial contributions, Murray Exh. 1, p. 4, but neither contributing money nor attending performances is entitled to weight. *See Scottsdale Talking Machine and Wireless Co., Inc.*, 6 FCC Rcd 7539, 7544 § 28 (Rev. Bd. 1991) (donations without active participation not credited), *rev. denied*, 7 FCC Rcd 4422 (1992). She also is a member of the Broome County Board of Realtors (1982-present) but has failed to show how this apparently business affiliation demonstrates a knowledge of and interest in the welfare of the community, the standard set in the *Policy Statement*. *See Eve Ackerman*, 7 FCC Rcd at 2497 ¶ 15; *National Communications Industries*, 6 FCC Rcd at 1982 ¶ 25. Morgan has challenged Murray's activities as frivolous or antediluvian, but, unlike the applicants with merely episodic civic activity in *Ronald Sorenson*, 6 FCC Rcd at 1953 ¶ ¶ 10-11, and *Linda Crook*, 3 FCC Rcd 354, 354 ¶ 5 (Rev. Bd. 1988), to whom Morgan compares Murray, Murray has been continuously involved in community activities for a long time. *See Colonial Communications*, 6 FCC Rcd at 2297 ¶ 11. Although her affiliations have changed over time, she has shown herself to be more than a gadfly who occasionally enters the civic life of the community. She has shown a pattern of civic participation over a long time and, as in *WCVQ, Inc.*, 7 FCC Rcd 4849, 4854 ¶ 19 (Rev. Bd. 1992), "[w]e perceive no principled basis for discounting [her] activities." That some activities involve listening to the speakers sponsored by organizations to which she belongs does not for that reason render them too frivolous for consideration, for speakers can help familiarize their listeners with changing local interests and needs. On the other hand, we agree with Morgan that organizing food and decorations for a lunch, buying season tickets to cultural performances, and attending parties, promotions and the like "are not the stripe of civic activities contemplated by the *Policy Statement* as betokening a concerned familiarity with a community's contemporary needs and problems, to which broadcasters must be attuned." *Newton Television Limited*, 3 FCC Rcd at 560 n.15.

10. Morgan first became involved in civic activities in 1975. She is active in the Hillcrest Community Association since becoming a member in 1979, and chaired or co-chaired the summer program from 1982-84 and was a Board member from 1979 until 1984. She describes herself as an active Junior League member from 1979-1981, active with her church Sunshine Group since 1979, and a grade mother at her children's schools for all but one year between 1975 and 1986. She is a member of the high school Booster Club and participates in activities (1984 to present). She volunteered with the United Way in 1981 and with the Red Cross in 1988-89, helping with the blood testing program. 7 FCC Rcd at 4086 ¶ 31; Morgan Exh. 1. Battisti and Murray complain that the ALJ impermissibly allowed her to upgrade her qualifications by showing in her direct case that her activities were located in the proposed service area and her overall participation averaged about one hundred hours a year. We do not share this view for Morgan was clear in her integration statement that she sought credit for these activities, and her direct case merely clarified her eligibility for the credit she sought. *See generally Nugget Broadcasting Company*, FCC 92R-5, slip op. at 2 ¶ 5, released March 5, 1993 (applicant's clarification during testimony that residence was within proposed service area held not impermissible upgrade); *Charisma Broadcasting Corp.*, 6 FCC Rcd 3411, 3412-13 (Rev. Bd. 1991) (applicant's failure to specify its hours-per-week integration commitment in its direct case held harmless technical error where integration statement contained the information and there was no variance at the hearing), *rev. denied*, 8 FCC Rcd 864, 864-66 (1993) (Commission modifies past practice so that

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Waverly, Owego and Sidney, New York." She says that Waverly is off the map Battisti supplied with his application. *Id.* at 18 n.44.

[14] The Board also has not credited the following activities because of Battisti's failure to show their location in or connection with the proposed service area: New York State Kiwanis, Kiwanis International, Prison Rehabilitation Incorporated, Knights of Columbus, Alhambra Sidona Caravan # 212, Benevolent Protective Order of Elks, Muscular Dystrophy Association Labor Day Telethon, Jaycees New York State, Susquehanna Toastmasters, and American Cancer Society. The Board has not credited the following for Battisti's failure to show the communities involved are in the service area: Sydney Kiwanis Club, Town of Union Republican Executive Committee, and Owego Lions Club. The Board has not credited Battisti with the New York State Restaurant Association or Banker's Trust affiliations because he also has not shown how these apparently business associations qualify as civic activities. *See Eve Ackerman*, 7 FCC Rcd 2493, 2497 ¶15 (Rev. Bd.), *rev. denied*, 7 FCC Rcd 6872 (1992); *National Communications Industries*, 6 FCC Rcd 1978, 1982 ¶ 25 (Rev. Bd. 1991), *modified on other grounds*, 7 FCC Rcd 1703 (1992).

[15] These are: Multiple Sclerosis Society (5 times between 1975-82); Leukemia Society (9 times between 1975-91, including once as District Captain); American Cancer Society (6 times between 1980-88); American Heart Foundation (7 times between 1982-88); and United Way of Broome County (14 times between 1970-88, including once as District Captain). Murray Exh. 1, pp. 3-4.

applicants describing full-time proposal in integration statement need not specify hours per week in direct written case).

11. When evaluating the applicants' knowledge of and interest in the community from their civic involvement, the Commission favors the applicant with the "greater and continuous civic involvement in a wider range of activities," *Bible Broadcasting Network, Inc.*, 7 FCC Rcd at 4578 ¶ 4 (quoting from Board's decision, 7 FCC Rcd at 435 ¶ 15), and also the applicant with the more intensive participation, such as through leadership positions. *Rebecca L. Boedker*, 6 FCC Rcd 2557, 2558 ¶ 12 (1991); *see Coastal Broadcasting Partners*, 7 FCC Rcd at 1438 n. 22 (Commission looks at depth, duration, and variety of activities); *Naguabo Broadcasting Company*, 6 FCC Rcd at 4880 ¶ 9 (fundraising for organizations in which one is not a member viewed as less significant than leadership). Battisti's involvement in the community establishes his superiority over both Murray and Morgan for his involvement in the community has not only been continuous since 1966 but includes leadership roles as well as membership participation. This leadership distinguishes him from Murray, who has been active in political organizations until 1984 but otherwise has largely participated in civic activities as an attendee or a volunteer fundraiser. Because Battisti's involvement reflects a greater overall knowledge of and interest in the community, *see Policy Statement* at 396, it outweighs Murray's marginal advantage for having lived in the service area a few years longer than he has. Battisti's leadership roles also distinguish him from Morgan, who can claim a leadership role only in the Hillcrest Community Association and who became involved in the community later than he did. Battisti's civic advantage and his residence advantage establish a clear superiority over Morgan.[16]

REQUESTS FOR REMAND

12. The Levines argue the ALJ erred in denying their motion to add a real-party-in-interest issue against Battisti and that he should be credited with no more than fifty percent integration because of what they contend is his wife's undisclosed interest in the applicant. The essence of their exception is that the Battistis have joint ownership of Battisti Builders & Associates and try to do everything together in that real estate business. They claim that Mrs. Battisti is integral to the station's financing because the applicant is using joint funds, she must guarantee the applicant's bank loan, and Battisti's financial qualifications are dependent on the family business, which will be in her hands if he receives the grant here. Mrs. Battisti is the bill payer for Battisti Builders and the check writer for the applicant. Battisti also was allegedly overheard asking his counsel why he did not want Mrs. Battisti to participate in the application. All of these, according to the Levines, show that Mrs. Battisti is just as involved in the radio station as in the other family business. Battisti agrees with the ALJ's *Memorandum Opinion and Order*, FCC 92M-3346, released December 13, 1991, denying the Levines' motion for the lack of a substantial showing that Mrs. Battisti was actively involved in prosecuting the application or that she intended to be a station co-owner or share in its management.

13. The Commission has said, "The test for determining whether a third person is a real-party-in-interest is whether that person has an ownership interest, or will be in a position to actually or potentially control the operation of the station." *Arnold L. Chase*, 61 RR 2d 111, 135 (1986). In applying the test, the Commission looks at the facts in the individual case to determine whether an individual has played or is likely to play a role usually reserved for one with an ownership interest. Where real-party-in-interest allegations involve family members, the burden on those seeking an issue is a heavy one because the Commission has recognized that "the relationship of family members acting independently from one another may have attributes which would, in non-family situations, warrant further inquiry." *CR Broadcasting*, 6 FCC Rcd 4180, 4181 n.2 (1989). Neither the fact of the family relationship nor the use of joint funds are, by themselves, sufficient to justify an issue. *Id.*; *Richard P. Bott, II*, 4 FCC Rcd 4924, 4929 ¶ 26 (Rev. Bd. 1989) (use of joint funds not determinative) (subsequent history omitted); *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 651 (Rev. Bd. 1983) ("family relationship alone does not warrant addition of such an issue") (subsequent history omitted). Nor are the Battistis' teamwork in the real estate business or her bookkeeping assistance sufficient for, unlike *Bott* where the broadcaster husband's involvement in his wife's application demonstrated they would likely function as a marital unit in the operation of the station,[17] nothing tendered here shows Mrs. Battisti has played any role in furthering the application other than consenting to use of family funds and helping to write checks. The facts alleged here, when taken as a whole, are insufficient support for a real-party-in-interest issue. We are denying this exception.

14. Parties have also excepted to the ALJ's rulings below denying real-party-in-interest and financial issues against Morgan and financial and false financial certification issues against Murray. Because the Board has determined that Battisti is the best qualified applicant under the comparative criteria set forth in the *Policy Statement*,

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[16] In her Reply to Exceptions at 20-21, Morgan complains that giving Battisti (and Murray) credit for living in the area longer than she has is age discrimination because, by virtue of being older, he has been able to live there longer. However, the overall credit is not directly based on age or solely on length of residence. As noted in the text, the difference in residence becomes less significant with the passage of time and can be overcome with a showing of substantial civic activities, as Murray's residence advantage over Battisti was overcome by his record of activities. *See Ronald Sorenson*, 6 FCC Rcd at 1953. Battisti also has a stronger record of civic involvement than Morgan has, including leadership positions subsequent to the time Morgan moved to the area and began her civic activities. Even if both applicants were given equal credit for their long-term residence in the area, Battisti would be preferred because of his civic participation. Unlike length of residence, civic participation while a resident would seem to be uniquely within an applicant's control.

[17] In *Bott*, the broadcaster husband originated the idea, contacted the banker and site owner, accompanied his wife to meetings with the attorney, and participated in selecting station personnel. She used his broadcast counsel and engineering consultant. They agreed to use joint funds for her station.

these issues are not decisional and need not be addressed. *See Deep South Broadcasting Co. v. FCC*, 278 F.2d 264, 266 (D.C. Cir. 1960).

15. Finally, Battisti and Murray argue that a remand is also necessary because the ALJ did not allow cross examination of Morgan. In adopting *Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 157 (1990), *recon. granted in part*, 6 FCC Rcd 3403 (1991), the Commission expressed its intention that "ALJs should permit oral testimony and cross examination only where material issues of decisional fact cannot adequately be resolved without oral evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings." 6 FCC Rcd at 162 ¶ 36. Parties are expected to test an applicant's bona fides through the discovery process and use material uncovered during that process to support requests for oral testimony. "Witnesses should not be requested for cross-examination unless there is a legitimate expectation that some part of their direct testimony, as reflected in exhibits, is subject to a question of substantial decisional significance." *Id.*, *reaffirmed*, 6 FCC Rcd at 3404; *see* 47 CFR 1.248(d)(4). Murray argues only that Morgan's credibility and demeanor should be tested and Battisti says only that she accepted assistance from her brothers-in-law, the same complaint raised in seeking a real-party-in-interest issue against Morgan. But, merely hoping that a witness will not appear credible or that a nefarious scheme warranting an issue might be uncovered lacks the specifics necessary for showing there is an untried substantial question of decisional significance in this proceeding or that the ALJ abused his discretion in denying cross examination. The more general dissatisfactions Murray has expressed about limiting routine use of cross examination in light of the hearing reforms were addressed by the Commission in adopting the reforms, *see* 6 FCC Rcd at 162 ¶ 35-36, and involve policy questions beyond the Board's purview.

16. ACCORDINGLY, IT IS ORDERED That the Request for Oral Argument of Maurice F. A. Battisti IS DENIED.

17. IT IS FURTHER ORDERED That the application of Maurice F. A. Battisti (File No. BPH-900515ME) IS GRANTED and the applications of Edward F. and Pamela J. Levine (File No. BPH-900514MM), Mary C. Murray (File No. 900516MT), and Carol A. Morgan (File No. BPH- 900516MU) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 7, 1993

Pactel Paging Files Request for Declaratory Ruling

Pleading Cycle Established

COMMENTS: May 5, 1993
REPLY COMMENTS: May 26, 1993

On March 24, 1993, Pactel Paging (Pactel) filed a petition for a declaratory ruling that: (a) common carrier paging operators licensed pursuant to Part 22 of the Commission's Rules provide exchange service within the meaning of Section 221(b) of the Communications Act of 1934; (b) the exchange services provided by common carrier paging operators are subject to regulation by a state commission or by a local governmental authority within the meaning of Section 221(b) of the Act whether or not particular states choose to exercise their regulatory authority; and (c) common carrier paging operators are exempted by Section 221(b) of the Act from having to file and maintain federal tariffs, notwithstanding a decision on November 13, 1992, by the United States Court of Appeals for the District of Columbia Circuit which vacated the Commission's permissive detariffing (forbearance) rules as applied in the *Fourth Report & Order* in the *Competitive Carrier Proceeding*. The forbearance rules invalidated by the Court excused certain nondominant carriers from the tariff filing requirements of Section 203 of the Communications Act. Pactel submits that paging companies should not have to file federal tariffs notwithstanding the Court's decision.

Pending a ruling on this request, Pactel asks that the Commission release a public notice indicating that paging companies need not file tariffs at this time.

Interested parties may file comments regarding the Pactel petition no later than May 5, 1993. Reply comments may be filed no later than May 26, 1993.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-258

In the Matter of

Implementation of Section 10 of the
Cable Consumer Protection and
Competition Act of 1992

Indecent Programming and Other Types
of Materials on Cable Access Channels

SECOND REPORT AND ORDER

Adopted: March 25, 1993; Released: April 2, 1993

By the Commission: Commissioner Marshall not participating.

I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. §1460. Section 10(c) of the new Act expressly provides:

> Within 180 days following the date of the enactment of this Act, the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

2. On November 5, 1992, we adopted a *Notice of Proposed Rule Making*, 7 FCC Rcd 7709 (1992), seeking comment on proposals to implement section 10, including subsection (c) noted above. On February 1, 1993, we adopted a *First Report and Order ("First Report")*, 8 FCC Rcd 998 (1993), to implement section 10(b) of the new Act, which requires cable operators to block indecent programming on commercial leased access channels of cable systems unless subscribers specifically request access to such programming in writing. In the *First Report*, we stated that rules to implement section 10(c) of the Act, would be adopted at a subsequent date. This *Second Report and Order*, adopted today, constitutes our implementation of section 10(c) of the Act, as required under the 1992 Cable Act.

3. We received comments in this proceeding from cable operators, cable access organizations, governmental authorities, and others who might be directly or indirectly affected by cable operator-imposed restrictions on public, educational, and governmental ("PEG") access channels.[1] In the paragraphs that follow, we discuss the major issues raised by the commenters as they relate to section 10(c) and its implementation and the conclusions we reach on these matters.[2]

II. RELEVANT STATUTORY PROVISIONS

4. To provide an overall understanding of the issues involved in this proceeding, we shall first outline the relevant statutory provisions in the existing Communications Act of 1934, as amended, and the new Cable Act. First, section 611 of the Act, 47 U.S.C. §531, provides that franchising authorities "may establish requirements . . . with respect to the designation of channel capacity for public, educational, or governmental use . . ." 47 U.S.C. §531(a). Thus, unlike the commercial leased access channel requirements of section 612 of the Communications Act, 47 U.S.C. §532, cable operators are not required by the Communications Act to provide public, educational or governmental access channels. Rather, the Act allows, but does not require, franchising authorities to impose PEG obligations. In addition, sections 611(b) and 611(c), 47 U.S.C. §531(b) and (c), state that a franchising authority "may require rules and procedures for the use of the channel capacity designated pursuant to this section" and "may enforce any requirement in any franchise regarding the providing or use" of such channel capacity.

5. Section 611(e), 47 U.S.C. §531(e), expressly prohibits cable operators from exercising "any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section." That provision is subject to section 624(d), 47 U.S.C. §544(d), which allows a franchising authority and a cable operator to specify, in a franchise or renewal thereof, that certain services shall not be provided or shall be provided subject to conditions, if such services are "obscene or otherwise unprotected by the Constitution of the United States." Section 611(i) is now further subject to section 10(c) of the 1992 Cable Act, which, as noted above, permits cable operators to exercise editorial control over PEG channels for the limited purposes of prohibiting "programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Finally, as noted in the *First Report and Order*, section 10(d) of the new Cable Act amended section 638 of the Communications Act, 47 U.S.C. §548, by removing cable operators' immunity for programs that involve obscene materials on any of the access channels (leased and PEG alike).[3] Having outlined the relevant statutory provisions, we shall now turn to the issues at hand.

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[1] A list of the commenters in this proceeding is provided in Appendix B.

[2] Just as we stated in the *First Report* regarding commercial leased access, the question of which persons or entities should be required to bear the costs and expenses that arise when cable operators choose to prohibit materials under section 10 is more appropriately addressed in the cable rate regulation proceeding. *See Notice of Proposed Rulemaking in MM Docket No. 92-266*, FCC 92-544 (adopted December 10, 1992; released December 24, 1992).

[3] This particular provision is self-effectuating and therefore became effective December 4, 1992.

III. CONSTITUTIONALITY OF SECTION 10(c)

6. As noted in the *First Report*, many commenters, including cable operators, access organizations and access users, challenged the constitutionality of section 10 of the new Cable Act, although, in some instances, for completely different reasons. Many of the arguments addressed therein were not limited to sections 10(a) and 10(b) of the new Cable Act relating to commercial leased access but were also directed to section 10(c) as it applies to the PEG channels. On the other hand, some cable interests, for example NCTA, maintain that to the extent section 10 affords cable operators the discretion to prohibit such materials on the PEG channels, it simply restores some of their first amendment rights on such channels.[4]

Discussion

7. In the *First Report*, we rejected a constitutional challenge that section 10(a), which permits cable operators to prohibit indecent programming through a written and published policy, constitutes "state action" and is therefore unconstitutional because it allows cable operators to serve as "surrogates" for the government and prohibit indecent programming completely on commercial leased access. Instead, we held that a voluntary policy prohibiting such programming does not constitute state action and, therefore, because section 10(a) does not mandate such cable operator policies, the section does not violate the prohibition on government regulation of speech under the first amendment.[5]

8. With respect to the similar claim that a cable operator's discretion exercised pursuant to section 10(c) is "state action," cable operators are not compelled under that provision to serve as "government surrogates" in prohibiting programming. Cable operators are merely given the freedom to prohibit certain types of program materials if they so choose, just as they are permitted to prohibit indecent programming under section 10(a). Nothing in the language or legislative history of this subsection suggests that Congress meant the additional latitude accorded to cable operators to be mandatory.[6] Thus, we do not believe that Congress' decision to allow cable operators editorial discretion as provided by the statute constitutes state action.

9. In addition, state action does not exist merely because cable operators are no longer immune from liability for obscene programming on access channels. In this regard, commenters argue that the "voluntary" aspect of the provision is removed, and hence is illusory, when coupled with section 10(d)'s removal of cable operator's immunity for obscene programming on access channels. However, by analogy, the fact that a common carrier may not be immune from liability for transmission of obscene materials if it has actual knowledge of the use of its facilities for this purpose in no way renders the activities of a common carrier state action when it prohibits the unlawful transmission of obscene material. Just as federal or state law can require that common carrier facilities be used only for lawful purposes, so too can such laws require that cable access facilities be used only for lawful purposes. Thus, as we explained in the *First Report*, para. 22 n.22, as with common carriers, a cable operator's decision to ban obscene programming does not constitute state action or even an unlawful restraint merely because the cable operator is subject to potential liability for carriage of obscene programming.

IV. IMPLEMENTATION OF SECTION 10(c)

A. Definition of Statutory Terms

10. The prohibitions which cable operators may impose under Section 10(c) cover "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."[7] Neither the statute nor the legislative history provide a definition of these terms. In the *Notice*, however, we stated that the Senate drafters apparently intended the term program-

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[4] As we stated in the *First Report*, our actions in this proceeding are limited to section 10's provisions and their implementation and, for this reason, we shall not address the constitutionality of other parts of the new Cable Act or existing Communications Act that are not directly at issue here or properly within the scope of our *Notice of Proposed Rule Making*.

[5] Similarly, we declined to hold that access channels are public forums and thus subject to the state action doctrine. We stated that none of the cases cited by Alliance had held that cable access channels were public forums. We pointed out that, by analogy, commercial leased access is similar in purpose and function to common carriage and that courts had refused to find that the activities of common carriers constitute state action for constitutional purposes. We believe that this same reasoning extends to public access channels on cable systems. Moreover, to the extent that educational and governmental access channels are to be used only by specified local entities, not the public at large, these channels would appear even less akin to public forum facilities.

[6] For this reason, this provision cannot be said to be "underinclusive," as alleged by Alliance and New York Committee for a Responsible Media because it singles out particular materials on the PEG channels but not on the non-access channels. Cable operators now have the same freedom to prohibit these materials on the PEG channels that they have on the non-access channels. In any event, Congress is free to determine that, in view of the unique attributes of these types of channels and the problems that they pose, cable operators should have this editorial discretion. As Alliance itself points out, "[e]ach method of communicating ideas is a 'law unto itself' and that law must reflect the 'differing natures, values, abuses, and dangers' of each method." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981), *quoting Kovacs v. Cooper*, 335 U.S. 77, 97 (1949).

[7] In this regard, we note that, to the extent section 10(c) covers materials also covered by section 624(d), section 10(c) permits unilateral action by cable operators, whereas section 624(d) contemplates action pursuant to agreement between cable operators and franchise authorities. In light of that, we disagree with commenters, such as the City of St. Paul, who contend that Congress did not intend section 10(c) to preempt any existing agreements entered into pursuant to section 624(d). The City of St. Paul argues that such prior agreements concerning the manner in which cable operators may exercise control over PEG channels should be viewed as "waiving" cable operator's section 10(c) rights. In view of section 10(c)'s permissive nature, such waivers, it is argued, do not conflict with, and therefore are not preempted by, section 10(c). As a general matter, however, we believe that agreements entered into prior to the effective date of rules implementing section 10(c) would not be viewed as "waiving" future section 10(c) rights unless such a waiver is express. Accordingly, unless the cable operator agrees, or a court determines, that future rights under section 10(c) have been

ming involving "sexually explicit" conduct to mean the same types of indecent programming material that may be prohibited by cable operators on leased access channels. *See* para. 13 n.11, citing 138 CONG. REC. S646 (daily ed. Jan. 30, 1992). Similarly, we suggested that the provision relating to "material soliciting or promoting unlawful conduct" may have been intended by Senate drafters to address programming that solicits prostitution. *Id.*

11. Alliance maintains that the particular restrictions relating to sexually explicit conduct and promoting unlawful conduct are overbroad. It, as well as Acton, states that the term "sexually explicit conduct" omits reference to patently offensive or to community standards. Boston Community Access maintains that this term is overbroad and that the FCC's interpretation is flawed. It argues that the term should be given the same meaning as "obscene." On the other hand, Cox Cable, Intermedia, New York State and others argue that the term should be construed as "indecent" and that the Commission should use the term "indecent" in the rules to avoid confusion and to clarify its meaning. According to Bogue and Lerom, the term should include frontal nudity, nude dancing, sadomasochistic behavior, execretory activities, exposed genitals and fondling.[8]

12. Acton maintains that the term "soliciting or promoting unlawful conduct" is not susceptible to the meaning suggested by the Commission in the *Notice* since it is not limited to prostitution but includes a vast array of criminal activities such as drug use and illegal gambling. The City of San Antonio states that the rules should clarify and specifically allow these terms to be defined by cable operators and also clarify whether unlawful conduct such as copyright infringement, presenting slanderous materials or violation of other similar laws can themselves be prohibited by cable operators in its policies. New York State says that Commission efforts to clarify this category should recognize that PEG channels are limited to noncommercial use. Alliance maintains that, under *Hess v. Indiana*, 414 U.S. 105, 108 (1973) and other cases, the U.S. Constitution forbids or proscribes restrictions on speech relating to advocacy of law violations. Santa Barbara echoes this view in stating that this provision would permit cable operators to ban advocacy of civil disobedience or material that might challenge existing laws. Manhattan Neighborhood Network suggests that restriction of the types of materials described in the statute is disturbingly vague and, therefore, urges that the rules should be specific and as narrowly defined as possible.

Discussion

Obscenity

13. At the outset, we conclude that cable operators, in order to exercise the limited degree of discretion allowable under section 10(c), must be apprised of the specific categories of programming they may prohibit and of the meaning that should be ascribed to these categories. Although the legislative history provides some guidance, it does not remove all ambiguity as to the meaning of these terms. With respect to programming "containing obscene materials," we believe that the scope of the this provision should be coextensive with materials that meet the test set forth in *Miller v. California*, 413 U.S. 15 (1973).[9] Thus, cable operators should be guided by the *Miller* obscenity standard in their determinations of what materials fit into the first category.

Sexually Explicit Conduct

14. The second category refers to programming containing "sexually explicit conduct." As noted above, neither the statute nor legislative history provides a definition of this phrase. Although we are urged by some commenters to construe these words to mean "obscene," we believe, as explained below, that a more reasonable construction of the statute would be to interpret these words as meaning "indecent." It is clear from the very words of the statute itself, and from the legislative history, that Congress did not intend the three categories of materials to be construed as either synonymous or interchangeable with each other. Congress clearly meant the third category, promoting or soliciting unlawful conduct, to be something different from the first category, obscene materials. Moreover, there is nothing to suggest that Congress intended the first and second categories to be construed the same; otherwise, Congress' inclusion of "sexually explicit conduct" would be mere surplusage and, hence, unnecessary. Thus, it is our belief that Congress intended each of these categories to be separate and distinct as to their meaning and application.[10]

15. Having concluded that Congress meant to ascribe different meanings to each of the terms used, we must discern from congressional intent the meaning that should be ascribed to the second category in section 10(c). As some of the parties point out, some programming may contain "sexually explicit conduct" that is not necessarily "indecent" as we define that term under section 10(b) and as described under section 10(a). Nevertheless, we believe that a construction of "sexually explicit conduct" to mean indecent programming is reasonable, given the purposes underlying section 10 as a whole and its legislative history, namely, reducing the exposure of viewers, especially children, to "indecent" programming on cable access

waived through a pre-existing franchise agreement, we believe that Congress intended the new rights accorded by section 10(c) to supersede prior agreements under section 624(d). Further, we do not believe such an interpretation is unfair to franchise authorities. A franchising authority's ability to impose PEG access requirement and to restrict a cable operator's control over such channels stems from provisions of the Cable Act, and Congress is free to create exceptions to those statutory provisions.

[8] They also assert that interpretations of this term should be made by local cable advisory committees. *See* discussion in para. 31, *infra*, regarding resolution of disputes.

[9] Although similar to the indecency standard, the test under *Miller* also requires findings (1) that the work appeals to the prurient interest and (2) that the work, if taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24.

[10] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 739-740 (1978) (words "obscene, indecent, or profane" in 18 U.S.C. §1464, written in disjunctive, meant to have separate meanings).

channels. This fact suggests to us that Congress did not intend to accord this term a meaning different from that of "indecent." In addition, by this interpretation, we think that cable operators and others will be able to discern the meaning of the term more clearly and precisely. In this regard, the courts have previously upheld the Commission's generic definition of "indecent" as sufficiently defined to provide guidance to a person of ordinary intelligence. *See Dial Information Services v. Thornburg*, 938 F.2d 1535, 1540-41 (2d Cir. 1991). Accordingly, we believe that the same standard applicable under section 10(a) and, as defined by us for purposes of section 10(b), should also govern cable operators' determinations under section 10(c).

Soliciting or Promoting Unlawful Conduct

16. As to the scope of the term "soliciting or promoting unlawful conduct," we believe that the intent underlying the statute is to make clear that if the dissemination of information or material would constitute unlawful solicitation of a crime or would otherwise be illegal under federal, state, or local law, it would also be subject to proscription by cable operators on the PEG access channels.

17. For example, consistent with the legislative history noted above, it would cover solicitation of prostitution where such solicitation is unlawful and therefore a crime. Similarly, it would appear to cover the presentation of materials that are unlawful because they are likely to incite an immediate breach of peace or otherwise incite imminent unlawful action. *See, e.g., Wilson v. Attaway*, 757 F.2d 1227 (11th Cir. 1985), *rehearing denied*, 764 F.2d 1411. It would also appear to include the making of a threat of bodily harm against a government informant since such threats are subject to punishment under federal law, 18 U.S.C.A. §1513, and have been held not to involve "threats" relating to ideas or advocacy. *See U.S. v. Velasquez*, 772 F.2d 1348 (7th Cir. 1985), *cert. denied*, 475 U.S. 1021 (1986). Similarly, the dissemination by any member of the military of secret military intelligence would appear to fit into this category because such dissemination is prohibited to "one not entitled to it" under 18 U.S.C.A. §793. *See United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 259 (1988). In these and analogous circumstances, the cable operator would be free to prohibit these materials on the basis that the disseminations are unlawful. Conversely, this part of the statute would not cover speech that is otherwise protected, e.g., speech advocating civil disobedience that is not directed at inciting or producing imminent lawless action. We believe this interpretation is reasonable and consistent with the intent and purpose underlying this particular provision. For example, we note by analogy that communications common carriers are permitted to prohibit use of their facilities for unlawful purposes.[11]

B. Cable Operator Discretion under Section 10(c)

18. Continental Cablevision states that section 10(c) should be interpreted to permit cable operators to prohibit some, but not necessarily all, of the types of programs specified in section 10(c). Acton states that since the PEG channel provision is voluntary, operators should have substantial flexibility, including the option to pursue a safe harbor approach for "mature" programming. If a cable operator has the statutory right to ban such programming, Acton asserts, it must have the lesser right to channel it. The City of San Antonio agrees insofar as it advocates rules that allow discretion to schedule programs so that more adult-oriented programming is reserved for later hours. Bogue and Lerom, however, state that the Commission should require that any indecent or sexually explicit programming may be shown only after midnight and before 6 a.m.

Discussion

19. We believe that section 10(c) was intended to afford cable operators broad discretion in deciding how to treat PEG programming covered by section 10(c). Thus, for example, we believe that a cable operator could decide under section 10(c) to prohibit only obscene programming from the PEG access channels but not other types of programming described in that subsection. Similarly, we believe that this discretion also allows cable operators to require indecent programming to be shown in the late evening hours, rather than prohibiting such programming entirely. A cable operator could also decide to prohibit such programming on the public access channel but not exercise such control over the other access channels designated by local authorities for educational or governmental use.

20. Further, we believe that a "reasonableness" standard should be read into section 10(c). This will permit cable operators to prohibit programming which they "reasonably believe" falls within the section 10(c) categories. Such an interpretation will ensure that cable operators act in good faith in making such determinations and will further ensure that, where local authorities have authorized PEG channels, materials falling outside the proscribed categories are not unreasonably barred from presentation.

C. Certification as Method of Enforcement of Prohibitions

21. In the *Notice*, we requested comment on whether it would be appropriate for cable operators to implement their section 10(c) policies by requiring certifications from users that no materials fitting into any of the statutory categories would be presented on these channels.

22. Cable interests were very supportive of a certification approach under section 10(c). Blade Communications favors allowing cable operators to require certification as to whether programming on the PEG channels is obscene and limiting liability for those who comply with regulatory steps for obtaining programmer certification. Similarly, CATA suggests that cable operators should be allowed to require and rely upon certifications from programmers and that the burden to identify such programming should be on programmers. NCTA and other cable interests also believe that cable operators should be able to rely on certifications and should be immunized from liability when doing so. In

[11] *See Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 FCC Rcd 2819 (1987).

addition, Nationwide urges that cable operators be allowed to obtain certifications from the party providing programming directly to the cable operator. TCI, also urging a certification approach, says that the Commission should state that cable operators are not liable for non-obscene programming on the access channels.

23. Franchising authorities also were generally receptive toward this approach. For example, the City of Austin states that a certification requirement would be an appropriate mechanism, although it urges the Commission to impose this requirement on the individuals responsible for programming content and to allow public access managers to administer it. Along similar lines, NATOA states that primary responsibility should be on programmers to identify obscene material and to certify that their programming does not contain obscene or indecent material. In addition, NATOA recommends, as others do, that programmers be permitted to certify on a blanket, as opposed to a program-by-program, basis. The City of Austin, however, advocates that the Commission craft its rules to allow cable operators very little discretion under any program certification process.[12] The City of San Antonio recommends that the new rules place the burden of certification on the producer.

24. Access organizations and access users were either opposed to, or less than enthusiastic about, use of a certification process. For example, Boston Community Access believes that requiring certification for each program would impose a huge new burden of staff work and paperwork on organizations such as itself, especially since there are very few access programs that actually contain material prohibited by the proposed rule. Similarly, Randy Visser maintains that requiring certifications for users of local public access channels is unrealistic and could not be enforced through the local cable regulatory structure. Alliance maintains that there is simply no need for the Commission to require that programmers certify the content of their programs because, in its opinion, operator liability should not be implicated. Other access groups, for example Ann Arbor, state generally that the rules should be specific and narrow so as not to hamper use of access channels by those seeking to provide live or taped programming.

Discussion

25. In the *First Report*, we stated that cable operators would not be precluded from requiring certifications from providers of leased access programming, as appropriate, under either section 10(a) (relating to a cable operator-enforced prohibition on indecent programming) or section 10(b) (relating to the blocking of indecent leased access programming). We stated that a relatively simple, straightfoward certification need not be burdensome nor serve as a deterrent to access users. We believe that the same analysis and conclusions apply to the PEG channels. Accordingly, we will not deny cable operators the right to require certifications that the programming intended for presentation on a PEG channel does not contain material that the cable operator has proscribed under section 10(c). Moreover, as we stated in the *First Report*, in view of the removal of cable operators' immunity for obscene programming on access channels, permitting a certification requirement is a reasonable approach for this agency to adopt.[13]

26. As suggested by several commenters, we thus believe that it would be permissible for cable operators to require blanket certifications from access users or from an access manager or administrator where the access manager or administrator agrees to assume the certification obligation.[14] This should minimize burdens both for access users and access administrators and managers. Indeed, from the comments received, it appears that a number of access organizations already have in place procedures that require certification statements, or their equivalent, from access programmers.[15] In addition, as suggested by a number of commenters, we believe that cable operators should be permitted to require certifications that reasonable efforts will be used to ensure that no live programming contains material prohibited by a cable operator under section 10(c).[16]

V. RESOLUTION OF DISPUTES

27. In the *Notice*, we asked commenters "to address whether specific procedures should be developed to govern disputes between the cable operator and programmer of these access channels." Because "these channels are mandated and their conditions of use are defined at the local level," we proposed that "any such disputes should be handled at the local level."

28. Cable operators differ on the question of the appropriate forum for resolution of section 10(c) disputes. For example, Acton argues that individual disputes should be resolved locally, preferably in court, although it would not be opposed to local franchising authorities that assume original jurisdiction over such matters. On the other hand, Intermedia would prefer that disputes over PEG channels and section 10(c) be adjudicated by the Commission.

29. Access organizations and interests argue that procedural safeguards should apply to disputes that arise over the content of material airing on the PEG access channels to ensure that cable operators do not impermissibly prohibit or otherwise restrain the showing of access program-

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[12] The City of Austin also alleges, as did Alliance, that the Commission's *Notice of Proposed Rule Making* failed to comply with the Administrative Procedure Act ("APA") and, therefore, urges the Commission to issue a revised *Notice*. We explained in the *First Report* the reasons for our belief that the *Notice* provided adequate notice of our proposals and opportunity to comment consistent with with APA requirements. Our rationale and analysis equally pertains to this part of the rulemaking process and, therefore, the City of Austin's arguments are rejected.

[13] Similarly, as permitted in the *First Report* relating to leased access, we will not deny cable operators the right to request indemnification from access users for the cost and expenses attributable to defending a prosecution for carriage of an alleged obscene program that is certified as "not obscene" by an access programmer.

[14] Access administrators, even if they decide not to certify themselves, could be required by cable operators to undertake the ministerial task of obtaining certifications from users.

[15] *See, e.g.*, Statement of Hudson Community Access Television.

[16] In the *First Report*, para. 51 n.43, we addressed and rejected arguments that certification requirements impermissibly violate program providers' rights under the first amendment or otherwise. In view of that discussion, we need not address these arguments again.

ming on these channels.[17] Baratta, however, states that all questions of content should be dealt with on the local level.

30. Governmental authorities are virtually unanimous in the view that such matters should be handled at the nonfederal level. For example, New York State maintains that since resolution of such disputes is a nonfederal matter, such matters, i.e., disputes between cable operators and programmers of the PEG channels, should be handled at the local level. Similarly, the City of San Antonio urges that the rules should provide for dispute resolution at the local level. However, the City of Austin argues that where the franchising authority is also the programmer, disputes should be resolved by the Commission but, otherwise, disputes should be handled by the franchising authority. NATOA, on the other hand, favors resolution of disputes in the judicial system, rather than by franchising authorities, at the local level, especially where the franchising authority may be the programmer, editor, or facilitator. The City of Tampa advocates initial review of disputes by the cable operator, followed by referral of unresolved disputes to a citizen advisory committee with appropriate authority, review by the franchising authority and, finally, judicial process.

Discussion

31. We believe that, to the extent possible, disputes under section 10(c) should be resolved in accordance with the rules and procedures established by the franchising authority for the operation of these channels. As pointed out earlier, section 611 expressly allows franchising authorities to specify rules and procedures for the PEG access channels and to enforce them. To the extent that a franchise agreement does not provide for resolution of PEG channel disputes, we assume that recourse could be obtained through the local judicial process given the local nature and character of these channels. Indeed, this might be especially appropriate where the dispute is between the franchising authority itself as a programmer or user of the PEG access channel and the cable operator. We see no need for federal intervention in such matters at this time.

VI. CLARIFICATION OF ASPECTS OF FIRST REPORT

32. In the *First Report*, we stated that copies of program provider identifications and/or certifications should be retained for eighteen months. We wish to clarify that, as the rule appendix to the *First Report* states, the records sufficient to verify cable operator compliance with the blocking requirement should be retained "for a period sufficient to cover the limitations period specified in 47 U.S.C. §503(b)(6)(B)," i.e., twelve months. Thus, the correct record retention period is twelve months as new rule section 76.701(h) provides. We also wish to clarify that while cable operators are required to retain requests to receive or terminate access to the blocked leased access channel for the twelve month period, they shall not make such information available to the public nor maintain such information in their public inspection files. Section 631 of the Communications Act, 47 U.S.C. §551, expressly prohibits cable operators from disclosing "personally identifiable information" about subscribers without their consent. Accordingly, such information should not be included in cable operators' public inspection files.

VII. FINAL REGULATORY ANALYSIS STATEMENT

33. The Need and Purpose of this Action. The regulations in this *Second Report and Order* are intended to implement that part of the Cable Consumer and Competition Act that directs the Commission to adopt regulations to enable cable operators to prohibit any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct on public, educational, or governmental access channels. The regulations accomplish this by allowing cable operators to prohibit such materials.

34. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis. Boston Community commented on the failure of the initial analysis to mention the far greater burdens that would be imposed on nonprofit access organizations, institutional access producers, and individual access producers, not merely the new burdens that would be placed on cable operators. Although others pointed out the burdens that would be imposed on these entities and persons, their comments were not specifically directed to the Initial Regulatory Flexibility Analysis.

35. *Significant Alternatives Considered and Rejected.* In this *Second Report*, we have considered the most efficacious manner of implementing section 10(c) without imposing unreasonable burdens on the various entities involved. Although a number of commenters alleged that a certification approach as suggested in the *Notice of Proposed Rule Making* would significantly increase burdens on administrators, managers, and users of the public, educational, and governmental access channels and, therefore, would not be appropriate, we have concluded that Congress gave cable operators broad discretion under section 10(c). Consistent with this approach, cable operators are permitted to require blanket, rather than program-by-program, certifications in an effort to ease burdens that might otherwise occur. Finally, the fact that a number of access organizations that administer or manage public access channels already have procedures similar to a certification process in place should further minimize the burdens under this approach.

VIII. CONCLUSION

36. Congress has directed us to adopt rules to enable cable operators to prohibit certain types of materials on the public, educational, and governmental access channels of cable systems. We believe that our action herein accomplishes this goal by balancing the respective interests of cable operators, access users and viewers in a manner designed to lessen the burdens for all interests alike.

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[17] Some commenters argue that procedural safeguards are required under the Constitution and must be provided if cable operators are allowed to prohibit or otherwise restrain certain types of programming on PEG channels under section 10(c). We have already rejected arguments that according cable operators additional control over their cable systems constitutes impermissible state action. As stated previously, the first amendment and the procedural safegards pertaining thereto, apply to government, not private, action.

IX. ORDERING CLAUSES

37. Accordingly, pursuant to section 10 of the Cable Consumer Protection and Competition Act of 1992, Pub. L. 102-385, and sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, Part 76 of the Commission's Rules IS AMENDED, as set forth in Appendix A below, effective 30 days from the date of publication in the *Federal Register*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

FINAL RULE

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation of Part 76 is amended to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Secs. 611-612, as amended, 106 Stat. §1460 , 47 U.S.C. §531-532

2. Part 76 is amended by adding at the end of Subpart L -- "Cable Television Access" new section 76.702 which reads as follows:

§76.702 Public, Educational and Governmental Access. Any cable operator may prohibit the use on its system of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, indecent material as defined in section 76.701(g), or material soliciting or promoting unlawful conduct. For purposes of this section, "material soliciting or promoting unlawful conduct" shall mean material that is otherwise proscribed by law. A cable operator may require any access user, or access manager or administrator agreeing to assume the responsibility of certifying, to certify that its programming does not contain any of the materials described above and that reasonable efforts will be used to ensure that live programming does not contain such material.

APPENDIX B

COMMENTS

Acton Corp., Allen's Television Cable Service, Inc., Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM, Inc., Monmouth Cablevision Assoc., TeleCable Corporation, Texas Cable TV Association, United Video Cablevision, Inc., West Virginia Cable Television Association ("Acton")

Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way (jointly) ("Alliance")

Ann Arbor Community Access Television

Arizona Cable Television Association*

Baratta, Mark Conrad*

Biddeford Public Access Corp.*

Blade Communications, Inc.; Multivision Cable TV Corp.; Parcable, Inc.; Providence Journal Company; and Sammons Communications, Inc. (jointly) ("Blade Communications")

Bogue, Virginia B. and Amy Lorum* ("Bogue and Lorum")

Boston Community Access and Programming Foundation ("Boston Community Access")

Capital Community Television, Salem, Oregon

City of Austin, Texas*

City of Cleveland Heights*

City of San Antonio, Texas

City of Santa Barbara*

City of Tampa, Florida

Cole, Roxie, Lee

Columbus Community Cable Access, Inc.

Community Access Network, Incorporated

Community Antenna Television Association, Inc. ("CATA")

Continental Cablevision, Inc. ("Continental Cablevision")

Cox Cable Communications ("Cox Cable")

Crandall, Judy

Defiance Community Television

Denver Area Educational Telecommunications Consortium, Inc. ("Denver Access")

Dreety, David B.

Ducarpe, Ron*

Fortriede, Steven C., Associate Director, Allen County Public Library, Fort Wayne, Indiana

Hillsborough County Board of County Commissioners

Hudson Community Access Television*

Inter-Comm Network

Intermedia Partners ("Intermedia")

Manhattan Neighborhood Network

Metropolitan Area Communications Commission*

Multnomah Community Television

National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors and the National Association of Counties ("NATOA")

National Cable Television Association, Inc. ("NCTA")

Nationwide Communications Inc. ("Nationwide Communications")

New York State Commission on Cable Television ("New York State")

Neuman-Scott, Mark*

Nutmeg Public Access Television, Inc.

Rhoda, Carolyn*

Seffren, David A.*

Tele-Communications, Inc. ("TCI")

Time Warner Entertainment Company, L.P. ("Time")

Visser, Randy, Director SPTV

Waycross Community Television

REPLY COMMENTS

Acton Corp., Allen's Television Cable Service, Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Greater Media, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM Inc., Monmouth Cablevision Assoc., TeleCable Corporation, Texas Cable TV Association, United Video Cablevision, Inc., West Virginia Cable Television Association, Western Communications, Inc. ("Acton")

Alliance for Community Media, The Alliance for Communications Democracy, The American Civil Liberties Union and People for the American Way ("Alliance")

Austin Community Television, Inc.

Baus, Janet

Cambridge Community Television

Channon, David

Cincinnati Community Video, Inc.

City of Austin, Texas

City of St. Paul

Columbus Community Cable Access, Inc.

Community Antenna Television Association, Inc.

Denver Area Educational Telecommunications Consortium, Inc.

("Denver Access")

Friendly, Joe

Malden Access Television*

Mollberg, Erik S.

Motion Picture Association of America, Inc. ("MPAA")

Multnomah Community Television

National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conferene of Mayors, and the National Association of Counties ("NATOA")

National Cable Television Association ("NCTA")

New York Citizens Committee For Responsible Media*

Northrup, Dan

Nunez, Fred

Olelo: The Corporation

Rancho Palos Verdes City Council*

Staten Island Community Television

Tele-Communications, Inc. ("TCI")

Time Warner Entertainment Company, L.P. ("Time")

Tucson Community Cable Corporation

Tsuno, Keiko

Viacom International Inc. ("Viacom")

Vitiello, Marisa

Waycross Community Television

Wyrod, Robert

* Informal comment or informal reply comment

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-93-037

Application for authority to acquire and operate additional Digital Circuit Multiplication Equipment for the provision of authorized services to various overseas points.

ORDER AND AUTHORIZATION

Adopted: April 2, 1993; Released: April 15, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed by AT&T pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-037 IS GRANTED, and AT&T is authorized to:

a. acquire, install and operate an additional 373 Digital Circuit Multiplication Equipment (DCME);[1] and

b. use the terminals to derive additional circuits for the provision of AT&T's regularly authorized services between the U.S. and the locations listed in Appendix A hereto.

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon its adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] AT&T has been authorized to acquire, install and operate 307 DCME under File No. ITC-91-191 (*see*, 6 FCC Rcd. 7189). The instant authorization will increase the total number of DCME to 680. Appendix B describes the bearer facilities with which AT&T is authorized to operate DCME.

APPENDIX A

LOCATIONS TO WHICH AT&T IS AUTHORIZED TO OPERATE DCME

American Samoa
Angola
Anguilla
Antigua
Argentina
Aruba
Australia
Austria
Bahamas
Bahrain
Bangladesh
Barbados
Belgium
Belize
Bermuda
Bolivia
Botswana
Brazil
British Virgin Islands
Brunei
Bulgaria
Burkina Faso
Cameroon
Cape Verde
Cayman Islands
Chile
China
Colombia
Commonwealth of Independent States, Georgia & the Baltic Republics
Costa Rica
Curacao
Cyprus
Czechoslovakia
Denmark
Diego Garcia
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
Ethiopia
Fiji Islands
Finland
France
French Antilles
Gabon
Gambia
Germany
Ghana
Greece
Grenada
Guam
Guatemala
Guinea
Guyana
Haiti
Honduras
Hong Kong
Hungary
Iceland
India
Indonesia
Iran
Iraq
Ireland
Israel
Italy
Ivory Coast
Jamaica
Japan
Jordan
Kenya
Korea
Kuwait
Lesotho
Luxembourg
Macau
Malaysia
Malta
Marshall Islands
Mauritius
Micronesia
Montserrat
Nepal
Netherlands
Netherlands Antilles
New Caledonia
New Zealand
Nicaragua
Nigeria
Norway
Oman
Pakistan
Panama
Papua New Guinea
Peru
Philippines
Poland
Portugal
Qatar
Romania
Rwanda
St. Kitts
St. Lucia
St. Vincent
Saipan
Saudi Arabia
Sierra Leone
Singapore
South Africa
Spain
Sri Lanka
Sudan
Suriname
Swaziland
Sweden
Switzerland
Syria
Tahiti
Taiwan
Thailand
Tonga
Tortola
Trinidad
Turkey
Turks & Caicos
Uganda
United Arab Emirates
United Kingdom
Uruguay
Venezuela
Vietnam
Western Samoa
Yemen
Yugoslavia
Zambia
Zimbabwe

APPENDIX B

AGGREGATE TOTALS OF DCME SYSTEMS, BY BEARER FACILITIES WITH WHICH AT&T IS AUTHORIZED TO OPERATE DCME

Bearer Facility	Total Systems
IDR/TDMA[2]	332
TAT-8	94
TAT-9	88
TAT-10	24
TAT-11	7
PTAT	33
TCS-1	32
HAW-4 TPC-3	45
HAW-5	6
TPC-4	9
NPC	10
Grand Total	680

2 "IDR/TDMA" refers to Intermediate Data Rate or Time Division Multiple Access satellite bearer channels.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-108

In re Application of

UNION BROADCASTING, INC. (hereafter "Union") File No. BMPH-921014IF

For Modification of Construction Permit for Station WRAJ-FM, Channel 243C2, Anna, Illinois

HEARING DESIGNATION ORDER

Adopted: April 7, 1993; Released: April 15, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned application for a modification of a construction permit for Station WRAJ-FM filed by Union Broadcasting, Inc. W. Russell Withers, Jr. ("Withers") opposes grant of Union's application.[1]

2. By way of background, Union currently holds a construction permit (File No. BPH-890531IB) for a new FM station on Channel 242 in Anna, Illinois. On October 14, 1992, Union filed the instant application to modify the permit by locating on a taller tower and thereby increasing the antenna height above average terrain (HAAT) from 227 meters to 275 meters. The taller tower is at a location which is virtually identical to that in the granted permit.[2] Withers, licensee of Stations KAPE(AM) and KGMO(FM), Cape Girardeau, Missouri, owns the tower site specified by Union. In fact, Withers owns both sites in question here, the "old" KGMO tower and the adjacent and taller "new" KGMO tower. According to Withers, although he agreed to let Union use the "old" tower, he has not given permission to use the "new" tower specified by Union. Union disputes this, insisting that it has the right to use the "new" tower.

3. Union argues that Withers' allegations are baseless and may have been advanced "solely for anticompetitive purposes." It references an "executed option agreement" for WRAJ use of the "new" tower.[3] According to Union this option agreement has been executed by J.W. Davis ("Davis"), Engineering Director of WSIL, Inc., and by Withers. Union asserts that it intends to "pursue its rights" under this agreement.

4. Withers argues that use of the "new" tower would not even have been contemplated until Union conducted a stress test, which it never did. According to Withers, such a test would have shown that the new tower could not accommodate the WRAJ antenna. Withers references a joint statement by himself and Davis, which, in paragraph 8, "makes clear that there was no contemplation" for placing the WRAJ antenna on the "new" tower. Withers also cites the "actual" Option for Tower Lease and Exhibit A thereto, the "initialed agreement" with Union, paragraph 1 of which he claims clearly refers to the "old" tower. According to Withers, Union's Exhibit A was never executed and is Union's "wish list." Withers further asserts that the executed Exhibit A concerns the "old" tower and an antenna height of 500 feet as opposed to the 191 meters proposed in Union's application.

5. An examination of the copy of the Option for Tower Lease presented by Union reveals that it was apparently executed by Davis and Union's representative on January 2, 1992. Union is granted therein the right to enter a Tower Lease Agreement, a copy of which is attached as Exhibit A. As indicated above, Union's Exhibit A is not signed by either party. Similarly, the copy of Exhibit A attached to the executed Option for Tower Lease presented by Withers references the "K10 KM" transmitter site which, according to Withers, is the "old" tower. While the copies of the "Option and Lease Agreement" presented by the parties appear to be identical,[4] the "Exhibit A's" submitted by each party are clearly different documents. In light of this as well as the fact that the parties present divergent characterizations of any understanding they may have concerning the intended tower site, it appears that an appropriate determination as to Union's legal right to utilize the antenna site specified in its application cannot be made absent further inquiry by the Commission.

6. The Commission requires assurance that a broadcast applicant's proposed transmitter site will be available should it eventually receive a grant. *Arizona Number One Radio, Inc.*, 102 FCC 2d 550, 556 (Rev. Bd. 1986), *aff'd*, 2 FCC Rcd 44 (1987). Although an applicant need not demonstrate a "binding agreement" or "absolute assurance" of site availability there must be at least a meeting of the minds between the applicant and the party controlling the site regarding key lease terms. *See Progressive Communications, Inc.*, (*"Progressive"*), 61 RR 2d 560 (Rev. Bd. 1986). Here, the fact that the site owner, Withers, and Union cannot even agree on the identity of the tower to be leased belies any reasonable possibility that all key lease terms have been agreed to. The contradictory assertions of Withers and Union raise a substantial and material question of fact as to the latter's reasonable

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[1] Withers submitted a letter on October 22, 1992 opposing a grant. On November 2, 1992, Union responded by letter, to which Withers, in turn, replied by letter on January 22, 1993.

[2] Union's engineering statement indicates that the new tower is at essentially the same geographic coordinates as the old tower, being but 0.5 seconds of latitude and longitude apart. Staff study confirms this statement: both sites are listed at 37 degrees 22 minutes 16 seconds north latitude and 89 degrees 31 minutes 52 seconds west longitude.

[3] Union attaches to its response an "Option for Tower Lease" signed by J.W. Davis and Union Principal Daniel S. Stratemeyer on January 2, 1992. Exhibit A to this document, entitled "Tower Lease Agreement," is not signed.

[4] The "Option for Tower Lease" submitted by Union is signed and dated on page two; that version submitted by Withers is signed but undated on page 2.

assurance as to the availability of the proposed site. Accordingly, the appropriate course of action is to resolve the site availability issue in the context of an evidentiary hearing. *Progressive*, at 563.

7. Withers' opposition to the captioned application can be considered as an informal objection to a grant pursuant to 47 C.F.R. §73.3587. In this regard, the evidence he presents in contradiction to Union's claim of a binding lease agreement for the "new" tower raises a substantial and material question of fact pursuant to §309(e) of the Communications Act of 1934, as amended. This statutory provision also mandates designation of the application.

8. Except as indicated by the issue specified below, Union is qualified to construct and operate as proposed. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the application of Union Broadcasting, Inc. IS DESIGNATED FOR HEARING IN A PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order upon the following issues:

1. to determine whether or not Union has reasonable assurance that the site specified in its application will be available to it.

2. To determine, in light of the evidence adduced pursuant to issue 1, above, whether Union is qualified to construct and operate the facilities sought herein.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this *Order* shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7202, Washington D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this *Order* shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the applicant shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this *Order*, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in the *Order*.

11. IT IS FURTHER ORDERED, That the applicant shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-107

In re Applications of:

DAVID A. RINGER (hereafter "Ringer")	File No. BPH-911230MA
ASF BROADCASTING CORPORATION (hereafter "ASF")	File No. BPH-911230MB
WILBURN INDUSTRIES, INC. (hereafter "Wilburn")	File No. BPH-911230MC
KYONG JA MATCHAK (hereafter "Matchak")	File No. BPH-911230MF
SHELLEE F. DAVIS (hereafter "Davis")	File No. BPH-911231MA
WESTERVILLE BROADCASTING COMPANY LIMITED PARTNERSHIP (hereafter "WBC")	File No. BPH-911231MB
OHIO RADIO ASSOCIATES, INC. (hereafter "ORA")	File No. BPH-911231MC

For Construction Permit for
an FM Station on Channel 280A
in Westerville, Ohio

HEARING DESIGNATION ORDER

Adopted: April 7, 1993; Released: April 15, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for an FM station.[1] These applicants have filed for a channel allotment that became vacant as a result of denial of a renewal application for WBBY-FM, Westerville, Ohio. *Mid-Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986), *review denied*, 5 FCC Rcd 940 (1990), *reconsideration denied in part and dismissed in part*, 5 FCC Rcd 4596 (1990).

2. *Preliminary Matter.* On March 26, 1992, ORA filed petitions to deny the applications of Ringer, ASF, Wilburn, Matchak, and Davis.[2] These applicants have proposed to use former station WBBY-FM's existing transmitter site which is short-spaced, pursuant to 47 C.F.R. § 73.207,[3] to WTTF-FM, Tiffin, Ohio. ORA contends that the above-mentioned applications must be dismissed, as two of the remaining applicants in the proceeding, ORA and WBC, propose sites that are fully-spaced.[4] ORA contends that in comparative hearings, when an applicant is short-spaced and at least one other applicant in the proceeding proposes a fully-spaced and technically suitable site, it is Commission policy to deny the short-spaced applicant. ORA further claims that these applicants are proposing to use WBBY-FM's existing short-spaced site for private economic reasons and granting them would not be in the public interest when two other applicants in the proceeding are proposing fully-spaced sites.

3. ORA, in its petitions, further objects to the applications of Ringer, ASF and Matchak because each filed their respective applications using the provisions of 47 C.F.R. § 73.215.[5] ORA claims that pursuant to the *Report and Order* in MM Docket No. 87-121, 4 FCC Rcd 1681 (1988), an applicant can only request processing under 47 C.F.R. § 73.215 when no other fully-spaced sites are available and therefore, these applications should be dismissed.

4. Ringer, ASF and Matchak, in their respective oppositions and related filings, argue that 47 C.F.R. § 73.207 permits them to request processing under 47 C.F.R. §

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[1] Mutually exclusive applicants Juanita M. and James L. Dean (BPH-911230MD) and John L. Landy (BPH-911230ME) were dismissed on July 14, 1992, for failure to pay a hearing fee.

[2] On April 7, 1992, ASF filed an opposition to ORA's petition to deny. On April 8, 1992, Ringer, Matchak and Davis filed their oppositions. On April 10, 1992, Davis filed a supplement to her opposition. On April 9, and April 14, 1992, Wilburn filed an opposition and supplement to its opposition. On April 20, 1992, ORA filed a reply to each of the oppositions. On April 27, 1992, Davis filed a motion to strike part of ORA's reply and on May 6, 1992, ORA filed an opposition to Davis' motion. On May 1, 1992, Matchak filed a response to ORA's reply and on May 6, 1992, ORA filed a motion to strike that response. On July 29, 1992, ORA filed supplements to the petitions to deny. On August 6, August 10, August 11, August 12, and August 31, 1992, Wilburn, ASF, Davis, Ringer, and Matchak, respectively, filed oppositions to ORA's supplements. On August 19, 1992, ORA filed a reply to Davis' opposition. On January 25, 1993, ORA filed additional supplements to the petitions to deny the applications of Ringer, ASF, Wilburn, Matchak, and Davis. On January 28, February 1, February 4, and February 16, 1993, ASF, Wilburn, Ringer, and Davis, respectively, filed oppositions to ORA's supplements to the petitions to deny. Finally, on February 19, 1993, ORA filed a consolidated reply to the oppositions.

[3] Section 73.207 lists the minimum distance separation requirements between FM broadcast stations.

[4] The same contention is made by WTTF, Inc., licensee of Station WTTF-FM, Tiffin, Ohio, in informal objections filed September 11, 1992, against Ringer, ASF, Wilburn, Matchak and Davis. In light of the action taken herein, the informal objections are denied.

[5] Section 73.215 states in part that "[t]he Commission will accept applications that specify short-spaced antenna locations (locations that do not meet the domestic co-channel and adjacent channel minimum distance separation requirements of § 73.207); Provided That, such applications propose contour protection . . . with all short-spaced assignments, applications and allotments, and meet the other applicable requirements of this section. . ."

73.215. Ringer and ASF further contend that ORA has misinterpreted the *Report and Order, supra,* and that, therein, the Commission intended to afford applicants increased flexibility in selecting their sites, not to restrict them only to fully-spaced sites.

5. Wilburn and Davis have each requested processing under 47 C.F.R. § 73.213(c)(1).[6] ORA contends that 47 C.F.R. § 73.213 applies only to existing stations, not vacant allotments. ORA further claims that while WBBY-FM was "grandfathered" under 47 C.F.R. § 73.213, this "grandfathering" does not extend to a new applicant for the same allotment. Additionally, ORA argues that Davis' application should be dismissed because Davis intends to increase its effective radiated power (ERP) from 3 kilowatts to 6 kilowatts ERP and has failed to obtain the consent of WTTF-FM for the increase in interference.

6. Wilburn and Davis, in their respective oppositions and related filings, argue that WBBY-FM became short-spaced when the spacing rules changed in 1989, and was "grandfathered" pursuant to 47 C.F.R. § 73.213. Wilburn and Davis further state that they are merely applying to use the facilities as licensed to WBBY-FM. Wilburn argues that "where the reference point of an allotment was fully-spaced when the allotment was made and the station was constructed and became short-spaced only by virtue of the new spacing rules, an applicant which proposes to replace a pre-existing facility on that channel may still apply for a station to operate at such reference point." Wilburn Opposition, at 5. Wilburn and Davis also contend that 47 C.F.R. § 73.207 specifically acknowledges the "grandfathering" provisions of 47 C.F.R. § 73.213.

7. Regarding Davis' increase in power, Davis contends that, while it is proposing to increase its power from 3 kilowatts ERP to 6 kilowatts ERP, it will limit its radiation toward WTTF-FM to 3 kilowatts ERP/100 meters antenna height above average terrain (HAAT) as allowed by 47 C.F.R. § 73.213(c)(1) and WTTF-FM's consent to this change is not necessary.

8. Ringer, ASF, Wilburn, Matchak, and Davis have each requested processing under either 47 C.F.R. § 73.215 or § 73.213 and, pursuant to 47 C.F.R. § 73.207(a), are exempt from processing under the Commission's general minimum spacing requirements. OAR's contention that the above-mentioned applications should be dismissed because there are applicants in the proceeding proposing fully-spaced sites is without merit. These applicants are permitted to assume the short-spacing of WBBY-FM, the previous licensee. *See EZ Communications, Inc.*, _____ FCC Rcd _____, DA 93-361, adopted March 26, 1993 (M.M. Bur.). The Commission will not give preferential treatment to applicants requesting processing under 47 C.F.R. § 73.207 over applicants requesting processing under 47 C.F.R. § 73.215 or § 73.213. Further, the applicant's reasons for proposing the use of former station WBBY-FM's transmitter site are immaterial. Each applicant must meet the technical requirements of the specific rules under which they request processing.[7]

9. Section 73.215(e) requires that a spacing of 96 kilometers be maintained between the site proposed by Ringer, ASF and Matchak (former station WBBY-FM's existing transmitter site) and WTTF-FM. The site proposed by Ringer, ASF and Matchak is 106.2 kilometers from WTTF-FM's transmitter site. Therefore, Ringer, ASF and Matchak's applications are eligible for processing under 47 C.F.R. § 73.215.

10. Prior to 1989, the Westerville, Ohio allotment was fully-spaced to WTTF-FM. However, in 1989, when the Commission revised the minimum spacing requirements, the Westerville allotment became short-spaced to WTTF-FM. Section 73.213(c)(1) requires that a spacing of 105 kilometers be maintained between the site proposed by Wilburn and Davis (former station WBBY-FM's existing transmitter site) and WTTF-FM. The site proposed by Wilburn and Davis is 106.2 kilometers from WTTF-FM's transmitter site. Accordingly, their applications are eligible for processing under 47 C.F.R. § 73.213(c)(1).

11. As to ORA's contention that Davis must have WTTF-FM's consent to increase its power from 3 kilowatts ERP to 6 kilowatts ERP, Davis proposes to limit its radiation toward WTTF-FM to 3 kilowatts ERP/100 meters antenna HAAT. The Commission has held that it will "permit facility enhancements sought pursuant to § 73.213 that retain current coverage in directions where overlap exists..." *Memorandum Opinion and Order* in MM Docket No. 88-375, 6 FCC Rcd 3417, 3423 (1991). Since Davis proposes to maintain the 3 kilowatt ERP/100 meters antenna HAAT toward WTTF-FM, the consent of WTTF-FM is not required.

12. Additionally, ORA, in its petitions, alleges that Matchak and Davis filed amendments to correct deficiencies after the amendment-as-of-right date and that these late-filed amendments cannot be accepted for comparative purposes or to correct acceptability defects. In opposition, both Matchak and Davis submitted date-stamped copies of their amendments which reflected that the amendments were filed on March 9, 1992, and that the dates of the

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[6] Section 73.213(c) applies to stations that were fully-spaced pursuant to 47 C.F.R. § 73.207 prior to October 1, 1989, and which became short-spaced when 47 C.F.R. § 73.207 was revised. *Second Report and Order* in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989). Section 73.213(c) of the Commission rules states in part that "[i]f the reference coordinates of an allotment are short-spaced [under § 73.207] to an authorized facility or another allotment (as a result of the revision of § 73.207 in the *Second Report and Order* in MM Docket No. 88-375), an application for the allotment may be authorized, and subsequently modified after grant, in accordance with paragraph (c)(1) or (c)(2) of this section only with respect to such short-spacing." Section 73.213(c)(1) states that "[e]ach application for authority to operate a Class A station with no more than 3000 watts ERP and 100 meters antenna HAAT . . . must specify a transmitter site that meets the minimum distance separation requirements in this paragraph."

[7] ORA's supplements filed January 25, 1993, allege that in *John M. Salov*, 8 FCC Rcd 172 (1993), the Commission held that 47 C.F.R. § 73.213 applied only to existing short-spaced "stations" and that when allotments became vacant, 47 C.F.R. § 73.213 is no longer applicable. ORA further contends that the Commission stated that 47 C.F.R. § 73.215 could not be used to perpetuate "grandfathering" caused by a deleted station. The case cited by ORA is inapposite because, therein the Commission rescinded a short-spaced allotment that was no longer in compliance with the Commission's allotment policies. *John M. Salov*, 8 FCC Rcd at 174. In the case at hand, the Westerville allotment, which became short-spaced to WTTF-FM in 1989, continues to satisfy the Commission's allotment requirements pursuant to 47 C.F.R. § 73.213(c).

amendments were corrected to reflect that they were both filed on March 9, 1992, within the amendment-as-of-right period.[8]

13. *WBC.* Our Antenna Survey Branch has informed us that the Federal Aviation Administration (FAA) has determined that WBC's proposed tower structure is a hazard to air navigation due to potential electromagnetic interference (EMI). Accordingly, an air hazard issue will be specified.

14. *EEO.* The Commission requires that if there will be five or more full-time station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Ringer, ASF and Davis have filed such statements, they are deficient. Both Ringer and ASF have not supplied the name or title of the official who will be responsible for implementing the station's EEO program in response to Section II. Davis has failed to list a women's recruitment organization. Accordingly, Ringer, ASF and Davis will be required to file an amended EEO program with the presiding Administrative Law Judge or an appropriate issue will be specified by the Judge.

15. *Financial.* Section III, Item 3 of FCC Form 301 (June 1989) requires that an applicant specify each source of funds, including the name, address, telephone number, contact person if the source is an entity, any relationship of the source to the applicant, and the amount of funds to be supplied by each source. Although Davis has provided the name of the entity providing her funds, she has not provided the name of a contact person as requested in Item 3. Additionally, WBC has provided the name of the source of its funds but has not provided the address and telephone number of that source. Accordingly, Davis and WBC must each file an amendment which gives all the information required by Section III, Item 3 with the presiding Administrative Law Judge after this Order is released.

16. *Other matters.* The applicants below amended their applications on the dates shown. All of the amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.[9]

APPLICANTS	AMENDMENTS FILED
Ringer	April 29, 1992
ASF	March 24, 1992
Davis	May 4, 1992

17. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

18. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

19. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by WBC would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

20. IT IS FURTHER ORDERED, That the petitions to deny filed by ORA and the informal objections filed by WTTF, Inc. ARE HEREBY DENIED.

21. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

22. IT IS FURTHER ORDERED, That in accordance with paragraph 14 hereinabove, Ringer, ASF and Davis shall file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

23. IT IS FURTHER ORDERED, That in accordance with paragraph 15 hereinabove, Davis and WBC shall both submit an amendment which contains the information required by Section III, Item 3 of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

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[8] ORA also contends that Davis engaged in *ex parte* communications with the Commission's staff regarding this matter. However, we have determined that the communications by Davis and Matchak were not *ex parte* violations. Rather, they were status inquiries regarding the amendments, which had been erroneously date-stamped by the staff. Similarly, ORA contends that Davis' conversations with the Commission's staff, which occurred prior to December 27, 1991 (the date of Davis' engineering exhibit which references the conversations with the staff), regarding the filing of her application were *ex parte* communications. We have determined that these communications were not *ex parte* violations because they were made prior to the filing of an application by any of the applicants in this proceeding. *See Report and Order* in MM Docket No. 86-225, 2 FCC Rcd 3011, 3023 (1987).

[9] On April 16, 1992, Davis filed an opposition to ASF's amendment alleging that it should only be accepted for 47 C.F.R. § 1.65 purposes and that it should not alter ASF's comparative qualifications.

24. IT IS FURTHER ORDERED, That the late amendments filed by Ringer, ASF, and Davis ARE ACCEPTED to the extent indicated.

25. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

26. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

27. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 15, 1993

PLEADING CYCLE ESTABLISHED FOR OPPOSITIONS AND REPLIES TO PETITION FOR RECONSIDERATION OF THE COMMISSION'S PREEMPTION OF AUTOMATIC DEFAULT BLOCKING REQUIREMENTS FOR 900 SERVICES ESTABLISHED BY THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

The Public Service Commission of South Carolina (South Carolina PSC) has filed a petition for reconsideration of the Commission's *Memorandum Opinion and Order*, 8 FCC Rcd 698, released January 22, 1993, preempting regulations of the South Carolina PSC requiring local exchange carriers (LECs) in South Carolina to implement automatic default blocking for 900 and 900-type services offered in the state. Under automatic default blocking, subscribers would generally have access to 900 services blocked unless the subscriber affirmatively requests access to 900 services. Preemption had been requested in a petition filed by the National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc. (NAIS).

In its petition, the South Carolina PSC contends that the FCC's preemption is beyond the lawful authority of the agency and unsupported by the record in this proceeding. The petition also claims that the Commission erred in concluding that preemption was permitted under the 1992 Telephone Disclosure and Dispute Resolution Act.

The full text of this petition is available for review and copying in Room 544, 1919 M Street, N.W., Washington D.C. 20554, and copies may be purchased from the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington D.C. 20037, (202) 857-3800. Oppositions to the petition must be filed within 30 days of the date of this Public Notice. Replies to an Opposition must be filed within 15 days after the time for filing oppositions has expired. *See* Sections 1.4(b)(1), 1.429 of the Commission's Rules, 47 CFR §1.4(b)(1), §1.429.

Interested parties should file an original and five copies of oppositions or replies to this petition with the Secretary, FCC, 1919 M. Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington D.C. 20037.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

MM Docket No. 93-8

In the Matter of

Implementation of Section 4(g) of the
Cable Television Consumer Protection
Act of 1992

Home Shopping Station Issues

ORDER

Adopted: April 7, 1993; Released: April 8, 1993

Reply Comment Date: April 27, 1993

By the Chief, Mass Media Bureau

1. This action extends the deadline for filing reply comments in response to the *Notice of Proposed Rulemaking* in MM Docket No. 93-8, 8 FCC Rcd 660 (1993), in which the Commission seeks to determine whether broadcast stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity. The *Notice* was prompted by Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1] The deadline for reply comments was originally set for April 13, 1993.[2]

2. The Center for the Study of Commercialism (CSC) requests a two-week extension of the reply comment period in order to respond adequately to the comments that have been submitted. CSC states that the comments filed were unexpectedly voluminous in size and number and that public access to them was delayed. CSC also asserts that pending litigation concerning the 1992 Cable Act, as well as religious holidays during the reply comment period, justify an extension. Silver King Communications, Inc. opposes the request.

3. In light of the foregoing, the Bureau finds that good cause exists for an extension. Grant of the request will not prevent the Commission from completing its inquiry by July 2, 1993, as required by the 1992 Cable Act. Therefore, pursuant to 47 C.F.R. § 0.283, the deadline for filing reply comments in this proceeding is extended to April 27, 1993.

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).
[2] Comments were due by March 29, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

PALMER COMMUNICATIONS INCORPORATED — File No. MSDCD-93-01

Public Land Mobile Station KUD201

ORDER

Adopted: April 8, 1993; Released: April 15, 1993

By the Chief, Mobile Services Division:

1. In April 1992, Palmer Communications Incorporated (Palmer) brought to the Commission's attention information that it was operating an unauthorized station in the Public Land Mobile Service at Gallup, New Mexico. The Mobile Services Division (MSD) initiated an investigation into this matter.

2. The MSD and Palmer have reached an agreement which would terminate the MSD's investigation. The terms and conditions of this agreement are contained in the attached Consent Decree.

3. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We believe that the public interest would be served by approving the Consent Decree, the terms of which are incorporated herein by reference.

4. Accordingly, IT IS ORDERED that the Consent Decree attached to this Order IS ADOPTED.

5. IT IS FURTHER ORDERED that the investigation of Palmer Communications Incorporated initiated by the Mobile Service Division IS TERMINATED.

6. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

CONSENT DECREE

I. INTRODUCTION

1. This is a Consent Decree (the "Decree") between the Chief of the Mobile Services Division ("MSD") and Palmer Communications Incorporated ("Palmer").

2. Under the terms of this Consent Decree, Palmer agrees to make a voluntary payment totalling $40,000 for deposit into the United States Treasury, and the MSD agrees to terminate its investigation into the matters alleged in this proceeding.

II. BACKGROUND

3. At the relevant times referenced herein, Palmer was the licensee of certain Public Land Mobile Service (PLMS) facilities providing mobile telephone and paging service in the State of New Mexico. Palmer acquired the New Mexico facilities in August 1988 from Contact New Mexico, Inc. ("Contact"). Subsequently, pursuant to Commission consent in July 1992, Palmer assigned those facilities to Contact New Mexico Limited Partnership, a corporation having no relation to Contact. In the course of conducting a due diligence investigation to ensure that there would be no problems with the license status of the New Mexico facilities which Palmer had agreed to assign, Palmer discovered that it had been operating a 152.24 MHz paging facility at Gallup, New Mexico, without authority since acquiring the assets of Contact, along with several other 152.24 MHz facilities for which authority had been obtained.[1]

4. Following discovery of the matter, on April 16, 1992, Palmer notified the Commission of the above facts and requested Special Temporary Authority to continue operating the facility, which authority was granted shortly thereafter. Since that time, the Division has reviewed various submissions by Palmer concerning the circumstances of the operation of the facility in question, and has met with Palmer's representatives.

III. DEFINITIONS

5. For the purposes of this Decree, the following definitions apply:

(a) "Palmer" means Palmer Communications Incorporated or any of its successors in interest.

(b) "Order" means an order of the MSD adopting the terms and conditions of this Decree.

(c) "Final Order" means an Order of the MSD that is no longer appealable or subject to administrative or judicial reconsideration, review, appeal, or stay.

[1] The facility in question was the only facility licensed to Call Sign KUD201. Review of the Commission's PLMS database as of April 14, 1992, indicated that this Call Sign was listed as licensed to Grants Radiotelephone Service, Inc. By its terms, the authorization for this facility expired April 1, 1989.

IV. AGREEMENT

6. Palmer admits the jurisdiction of the Commission over it, and the subject matter of this action for purposes of this Decree and the Order adopting this Decree. All necessary jurisdictional facts are hereby admitted for purposes of this Decree.

7. Palmer waives any rights it may have to judicial review, appeal, or rights otherwise to challenge or contest the validity of any Order adopting this Decree. Palmer agrees that upon signing by Palmer and the MSD, the provisions of this Decree shall be incorporated by reference in the Order formally adopting this Decree.

8. This Decree is for purposes of settlement only, and its signing does not constitute an admission by Palmer of any violation of law, rules, or policy.

9. In consideration for the MSD's entering into this Decree and in order to avoid any disruption of service to the public, to conserve Commission resources, and in order to avoid litigation costs, Palmer hereby agrees to the following terms:

(a) Palmer will make a voluntary payment to the United States Treasury, without further protest or recourse, in the amount of $40,000, within five days after the Order adopting this Decree becomes a Final Order. Payment may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, to Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

(b) Palmer agrees that the contribution of $40,000 to the United States Treasury may not be claimed as a tax deduction.

(c) The failure of Palmer to comply with these terms will be considered a failure of compliance with this Decree.

10. In light of the covenants and representations contained in this Decree, and in express reliance thereon, the MSD will terminate its investigation of Palmer. Such termination is without a finding by the MSD of wrongdoing by Palmer. Further, the Division will not institute, on its own motion, any proceedings against Palmer based upon the information obtained during the investigation. The MSD will not conduct further proceedings of any kind based on the matters raised or investigated herein unless information beyond that made available in this proceeding and which warrants inquiry is presented.

11. Palmer agrees that any violation of the Order or this Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

12. If this Decree is not signed by the MSD and Palmer, or is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any fashion in a legal proceeding.

13. If the Commission, or the United States on behalf of the Commission, brings an action in any United States District Court to enforce the terms of the Order incorporating the terms of this Decree, Palmer agrees that it will not contest the validity of the Order, will waive any statutory right to a trial *de novo*, and will consent to a judgment incorporating the terms of this Decree.

FEDERAL COMMUNICATIONS COMMISSION
COMMON CARRIER BUREAU
MOBILE SERVICES DIVISION

By: _____
John Cimko, Chief

PALMER COMMUNICATIONS INCORPORATED

By: _____
Robert G. Engelhardt
Executive Vice President

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-132

In the Matter of

Competition in the Interstate
Interexchange Marketplace

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: March 29, 1993; Released: April 15, 1993

By the Commission:

I. INTRODUCTION

1. On November 25, 1991, AT&T filed a petition for declaratory ruling asking us to declare "that no interexchange carrier lawfully can include inbound capabilities with other services or capabilities in "packaged" contract or tariff offerings."[1] Effectively, AT&T asks us to extend the 800 and inbound service bundling restrictions adopted in the *Interexchange Proceeding* to all interexchange carriers.[2] Because the rationale used to justify the 800 and inbound service bundling restrictions in the *Interexchange Proceeding* does not extend to other interexchange carriers, we deny AT&T's petition.

II. BACKGROUND

2. In March of 1990, we initiated the *Interexchange Proceeding* to examine the state of competition in the interstate interexchange marketplace and to adapt our regulatory policies, where appropriate, to reflect current market realities. On August 1, 1991, we adopted the *Interexchange Order*, which concluded that most of AT&T's business services were now subject to substantial competition. In accordance with this conclusion, we streamlined our tariffing requirements for most business services and authorized AT&T to file contract-based tariffs for these services.

3. Although we concluded that business services were substantially competitive, we found in the *Interexchange Order* that AT&T still retains a market advantage in the provision of 800 and inbound services.[3] We based this conclusion on the fact that 800 numbers are not portable under existing local exchange network technology, so that a customer may not switch from one 800 service provider to another without also changing its 800 number. Noting that many 800 service subscribers are "captive" -- *i.e.*, they are unable to change 800 numbers without incurring substantial costs -- we found that the lack of 800 number portability confers a unique advantage on AT&T because of its substantial embedded base of 800 service subscribers.

4. We found further that AT&T has the ability to leverage its market power in 800 and inbound services by bundling these services with other services. In particular, we found that by bundling 800/inbound with other services, AT&T can use its power over captive 800 service customers to gain an advantage in other markets.[4] Accordingly, we prohibited AT&T from including 800 or inbound services in contract-based tariffs or Tariff 12 integrated services packages until 800 numbers become portable.[5] In order to protect the expectancy interests of the customers of such options and to avoid causing these customers undue disruption during the relatively limited transition period to full number portability, however, we allowed Tariff 12 options on file as of August 1, 1991 to remain in effect, even if they included inbound service.[6] Finally, we provided that AT&T must permit customers with Tariff 12 packages that include inbound service to terminate these packages within ninety days of the time 800 numbers become portable without the imposition of any termination liabilities.[7] We adopted this "fresh look" requirement so as to minimize the effects of leveraging in the marketplace.

5. On reconsideration, we modified the 800 and inbound service bundling restrictions to more closely tailor them to the problem posed by anticompetitive leveraging. Specifically, we decided that AT&T should only be precluded from offering customers bundled service arrangements that include "old" 800 numbers (those numbers in use by the customer prior to April 17, 1992) on the ground that customers using old 800 numbers were much more likely to be captive to AT&T.[8] We also applied the

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[1] AT&T Petition at 1. On December 5, 1991, CompTel and MCI filed oppositions to AT&T's petition. AT&T filed its reply on December 16, 1991. Following the release OF our *Reconsideration Order* on April 17, 1992, AT&T filed a motion for expedited consideration on June 17, 1992, asking the Commission to rule on its petition for declaratory ruling by September of 1992. On October 2, 1992, AT&T filed an "Emergency Petition for Writ of Mandamus" with the United States Court of Appeals for the District of Columbia Circuit asking the court to issue a writ of mandamus by January 15, 1993, ordering us to rule on AT&T's petition by February 15, 1993.

[2] Competition in the Interstate Interexchange Marketplace, *Notice of Proposed Rulemaking*, CC Docket No. 90-132, 5 FCC Rcd 2627 (1990) (*"NPRM"*); *Report and Order*, 6 FCC Rcd 5880 (1991) (*"Interexchange Order"*); *Order*, CC Docket No. 90-132, 6 FCC Rcd 7255 (Com. Car. Bur. 1991); *Memorandum Opinion and Order*, 6 FCC Rcd 7569 (1991) (*"Sua Sponte Reconsideration Order"*); *Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd 2677 (1992) (*"Reconsideration Order"*); petitions for reconsideration pending.

[3] *Interexchange Order*, 6 FCC Rcd at 5904.

[4] In contrast, bundling by carriers lacking market power was not found to pose a serious threat to competition in adjacent markets. *See* discussion at paras. 10-12, *infra*.

[5] 6 FCC Rcd at 5905-5906.

[6] 6 FCC Rcd at 5906. We later revised the grandfathering date to include all Tariff 12 options on file as of September 1, 1991. Competition in the Interstate Interexchange Marketplace, *Memorandum Opinion and Order*, CC Docket No. 90-132, FCC No. 91-390 (Nov. 25, 1991).

[7] 6 FCC Rcd at 5906.

[8] *Reconsideration Order*, *supra*, 7 FCC Rcd at 2679-2680.

modified bundling rules and restrictions to Tariff 16s and other tariffed service offerings that include 800 or inbound service and reaffirmed our "fresh look" policy.[9]

III. POSITIONS OF THE PARTIES

6. In its petition, AT&T argues that the 800 and inbound service bundling restrictions imposed in the *Interexchange Proceeding* were based entirely on our finding that until 800 numbers are portable, some inbound service customers might be leveraged into accepting a carrier's outbound services as well. AT&T contends that, to the extent that a customer is susceptible to anticompetitive leveraging by its incumbent service provider, it is equally susceptible regardless of the carrier's identity.[10] It argues that regulatory agencies must be consistent in their application of standards to similarly situated carriers, and that AT&T and its interexchange competitors are similarly situated with respect to 800 and inbound service bundling issues.[11] Finally, the petition argues that applying the bundling restrictions to AT&T alone is bad policy because it hinders AT&T's ability to compete in the marketplace on an equal basis with other carriers.[12]

7. MCI and CompTel oppose AT&T's petition on procedural and legal grounds. They contend that a petition for declaratory ruling is the wrong procedural vehicle for AT&T to press its claim because there is no controversy to be terminated or uncertainty to be removed.[13] Substantively, they argue that the Commission's decision to impose bundling restrictions on AT&T alone rested not only on the lack of 800 number portability, but also on a finding that AT&T alone could leverage its market power in inbound services to influence other more competitive markets. They claim that because AT&T had a twenty year head start in the inbound services market, its customers are larger and have invested more heavily in their 800 numbers. Thus, they contend that AT&T's customers are more likely to be susceptible to anticompetitive leveraging.[14]

IV. DISCUSSION

8. We deny AT&T's petition. Contrary to AT&T's assertion, the rationale used to justify the 800 and inbound service bundling restrictions in the *Interexchange Proceeding* does not extend to other interexchange carriers.

9. We note at the outset that although AT&T filed its petition as a prayer for a declaratory ruling, this was not the appropriate vehicle for AT&T to raise this issue. Section 1.2 of our Rules states that "[t]he Commission may, ... issue a declaratory ruling terminating a controversy or removing uncertainty." In adopting the 800 and inbound service bundling restrictions, we stated unequivocally that these restrictions applied to AT&T alone. Thus, for example, we said that "until 800 numbers are portable, we preclude AT&T from including in contracts and new Tariff 12 options any 800 or inbound service."[15] AT&T does not allege, and we do not find, any language in either the *Interexchange Order* or the *Reconsideration Order* that might lend itself to an interpretation that the 800 and inbound bundling restrictions might apply to any carrier other than AT&T. Under the circumstances, AT&T should have pursued the relief it seeks in a petition for further reconsideration, not a petition for declaratory ruling. Nevertheless, because AT&T filed its petition prior to the deadline for filing for reconsideration of that order, we treat this petition as a petition for further reconsideration and address it below on the merits.

10. AT&T argues in its petition that the 800 and inbound services bundling restrictions should apply to all carriers because the lack of 800 number portability affects customers of all carriers equally. This argument misses the point. It was our goal in the interexchange proceeding to adapt our regulatory policies to respond to the growth of competition in the marketplace. From the outset, we intended to accomplish this goal by modifying our regulation of AT&T.[16] Thus, in enacting 800 bundling restrictions, it was not our intent to prohibit 800 bundling in each and every instance in which there may be some degree of leveraging. Rather, our goal was to prohibit 800 bundling only where bundling can have a significant negative impact in the marketplace.[17]

11. We prohibited AT&T from bundling old 800 numbers because we believe that through such bundling, AT&T can "have an overall competitive impact on competition" in the business services marketplace.[18] We reached this conclusion in light of AT&T's market power in the provision of 800 services, including its substantial embedded base of 800 service subscribers. We found that approximately twenty percent of these subscribers are likely to be captive to their 800 number, a significant enough percentage to make a real difference in the marketplace.[19] We note, in this regard, that by most estimates

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[9] *Id.* at 2681-2683.
[10] AT&T Petition at 2.
[11] *Id.* at 3.
[12] *Id.* at 4-5.
[13] CompTel Opposition at 3-4; MCI Opposition at 1-3.
[14] CompTel Opposition at 1-2; MCI Opposition at 3-10.
[15] *Interexchange Order*, 6 FCC Rcd at 5906. *See also Reconsideration Order*, 7 FCC Rcd 2677 (modified bundling restrictions clearly indicate that they apply to AT&T alone).
[16] Our starting point in considering regulatory reforms for the long-distance marketplace was that AT&T, as the only carrier with market power, was the dominant carrier and was regulated as such by the Commission. From there, we examined the state of competition in the market and proposed and adopted regulatory reforms based on that competition. Our intent, therefore, was to adapt our regulation of AT&T to reflect the growth of competition -- or, as in the case of 800 bundling, to adopt measures to protect competition where competitive defects existed -- rather than to alter our regulation of carriers without market power. *See, e.g., NPRM*, 5 FCC Rcd at 2638-2649.
[17] *See, e.g., NPRM*, 5 FCC Rcd at 2635-2636. There we stated that "the lack of 800 number portability significantly limits the ability of [captive] customers to respond to price and service changes in the 800 market. This limitation exists with respect to all 800 customers, regardless of their carrier, but may bestow an undue advantage on AT&T, which still provides more than 80% of all interstate 800 services."
[18] *Interexchange Order*, 6 FCC Rcd at 5905-5906 (discussion at paras. 146 and 148-149 indicates that the relevant consideration in determining whether to restrict AT&T's ability to bundle 800 services with other services was whether AT&T, through bundling, can leverage its market power in 800 services to gain an advantage in the provision of other services).
[19] *Interexchange Order*, 6 FCC Rcd at 5904.

this base of captive customers is roughly equal in number to the entire 800 service customer base of the next-largest competitor in the 800 service market.[20]

12. We recognize that it is possible that individual 800 service subscribers of AT&T's competitors may in particular cases be "captive" and subject to some degree of leveraging. But these isolated instances of leveraging by carriers who lack market power in the provision of 800 services and who have small market shares relative to AT&T in 800 and other business services are not likely to impact the overall structure of the interexchange marketplace. Moreover, as a general matter, the customers of AT&T's competitors are likely to be less subject to leveraging than AT&T's customers, since some of AT&T's customers have used the same 800 number for twenty or more years, while other carriers were not even able to begin offering 800 service until 1987. Furthermore, unlike AT&T's captive customers, many of whom had no option other than AT&T for their 800 service, the customers of AT&T's competitors have been able to exercise a choice among 800 service providers.

V. CONCLUSION

13. We find that the rationale used to justify the 800 and inbound service bundling restrictions in the *Interexchange Proceeding* does not extend to other interexchange carriers and, therefore, we deny AT&T's petition.

VI. ORDERING CLAUSES

14. Accordingly, pursuant to authority contained in Sections 1, 4, and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205; Section 5(d) of the Administrative Procedure Act, 5 U.S.C. §§ 554; and Section 1.2 of our Rules, 47 C.F.R. § 1.2; IT IS ORDERED that AT&T's petition for declaratory ruling is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[20] Further evidence that our decision to apply the bundling restrictions to AT&T alone was driven by concerns about market advantages held by AT&T can be found in the *Reconsideration Order*. There, we modified the bundling restrictions adopted in the *Interexchange Order* by, *inter alia*, only prohibiting AT&T from future bundling using "old" 800 numbers -- 800 numbers that were in use by a customer the day prior to the release of that order (April 16, 1992). We found that the bundling by AT&T of "new" 800 numbers -- numbers not in use by a customer on or before April 16, 1992 -- did not present a significant threat of anticompetitive behavior. *Reconsideration Order*, 7 FCC Rcd at 2680-2681 and n.47. Under the modified bundling rules, it is possible that a customer taking "new" 800 numbers from AT&T after April 16, 1992 could invest substantially in those numbers and become a "captive" customer prior to accepting a bundled package of services from AT&T. We decided not to prohibit AT&T from making such deals, however, because we found that, as of April 16, 1992, the market advantages held by AT&T at the start of 800 services competition in 1987 had dissipated sufficiently. Thus, we found that on a going-forward basis AT&T's ability to influence competition for other services by bundling 800 or inbound service using "new" 800 numbers had diminished so that bundling restrictions were not warranted. *See Reconsideration Order*, 7 FCC Rcd at 2680-2681, n.45. Had our concerns in adopting the bundling prohibition been, as AT&T suggests, on the effects of bundling on each captive customer rather than on the effects on competitive markets, we would have adopted a bundling policy that required a customer to change its 800 numbers as a condition of taking a bundled offering from AT&T. *See Reconsideration Order*, 7 FCC Rcd at 2684-2686, Separate Statement of Commissioner Ervin S. Duggan, Concurring in Part and Dissenting in Part.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's
Rules to Modify Signature
Requirement for License
Applications in the Private
Radio Services

ORDER

Adopted: April 1, 1993; Released: April 15, 1993

By the Commission:

I. INTRODUCTION

1. This *Order* amends our rules governing signature requirements for license applications in the private radio services to facilitate the implementation of electronic filing of private radio license applications.

II. BACKGROUND

2. Under our current rules, all license applications filed with the Commission must include a handwritten signature. The signature requirement is applied to the private radio services in Section 1.913(a) of our Rules, 47 C.F.R. § 1.913(a), which requires private radio applications to be "personally" signed by the applicant.[1] Specific signature requirements are also set forth in Parts 90, 94, and 95 of our rules, which apply to the Private Land Mobile Radio Services, Private Operational Fixed Microwave Service, and General Mobile Radio Services, respectively.[2]

3. In October 1992, Congress amended the Communications Act of 1934 to allow electronic filing of license and construction permit applications. Telecommunications Authorization Act of 1992, Pub. L. No. 102-538, 106 Stat. 3533 (1992), § 204. Specifically, Sections 308(b) and 319(a) of the Act were amended to allow applications to be signed "in any manner or form, including by electronic means, as the Commission may prescribe by regulation." *Id.*, §§ 204(b),(c). A conforming amendment was also added to eliminate the requirement of a "signed" waiver under Section 304 of the Act. *Id.*, § 204(a).

III. DISCUSSION

4. Pursuant to the authority expressly delegated by Congress, we have decided to modify the handwritten signature requirement as it applies to applications in the private radio services. This will be accomplished by several specific amendments to our rules. First, Section 1.913(a) is amended by deleting the word "personally" from the application signature requirement. Second, the signature requirement is amended to give the Private Radio Bureau discretion to establish filing procedures by public notice that would allow applications to be "signed" by computer-generated impulses.

5. In addition, the sections of Parts 90, 94, and 95 that relate to the signature requirement have been deleted and replaced by cross-references to Section 1.913 as amended. The existing language in these sections is duplicative and unnecessary, as Section 1.913 is controlling with respect to all private radio services in any event. *See* 47 C.F.R. § 1.901.

6. Private radio applications comprise the largest category of applications that must be processed by the Commission. Modification of the handwritten signature requirement will allow us to move towards significantly more efficient processing of these applications. Our ultimate goal is to eliminate, to the maximum extent possible, the filing of paper applications. Electronic filing will expedite the licensing process by eliminating the need for manual entry of application data into the Commission's data base. We also hope to develop the means to generate and transmit license information to licensees electronically with no intermediate paper documents. The Private Radio Bureau is now conducting electronic filing experiments with the Industrial Telecommunications Association and the Utilities Telecommunications Council and has completed a pilot project with the Associated Public Safety-Communications Officers, Inc. Based on these initiatives, we hope to establish electronic filing procedures in the near future.[3]

7. We emphasize that under the rules as amended, handwritten signatures will continue to be required on all private radio applications unless and until the Private Radio Bureau establishes specific procedures for electronic filing of such applications. Such procedures will be implemented by future Public Notice in the *Federal Register*, modified application forms, and other published procedures.

IV. CONCLUSION

8. The rule changes adopted in this *Order* relate to matters of practice and procedure only. Therefore, they are excepted from the notice and comment requirement of the Administrative Procedure Act, 5 U.S.C. § 553(a), and may be put into effect immediately upon publication in the *Federal Register*. 5 U.S.C. § 553(d)(3); 47 C.F.R. § 1.427(b).

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[1] As used herein, "private radio services" refers to those services governed by Parts 80, 87, 90, 94, 95, and 97 of our rules. *See* 47 C.F.R. § 1.901.

[2] *See* 47 C.F.R. §§ 90.125, 94.29, and 95.87. Sections 90.125 and 94.29 are identical to Section 1.913, while Section 95.87 is duplicative in substance of Section 1.913(a). Parts 80, 87, and 97 of our rules contain no specific provisions regarding signatures.

[3] The amended rules also give the Private Radio Bureau discretion to adopt procedures for filing applications by facsimile transmission. Except in extreme emergencies, however, the Bureau does not accept applications by fax, and there are no procedures under consideration to do so.

9. Accordingly, IT IS ORDERED, that Sections 1.913, 90.5, 90.125, 94.29, and 95.87 of the Commission's Rules ARE AMENDED as set forth in the Appendix.

10. IT IS FURTHER ORDERED that this *Order* is effective as of the date of publication in the *Federal Register*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

A. Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 -- PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.913 is amended by revising paragraph (a) and adding new paragraph (e) to read as follows:

§ 1.913 Who may sign applications.

(a) Except as provided in paragraph (b) of this section, applications, amendments thereto, and related statements of fact required by the Commission must be signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer, director, or duly authorized employee, if the applicant is a corporation; or by a member who is an officer, if the applicant is an unincorporated association. Applications, amendments, and related statements of fact filed on behalf of eligible government entities such as states and territories of the United States, their political subdivisions, the District of Columbia, and units of local government, including unincorporated municipalities, must be signed by a duly elected or appointed official who is authorized to do so under the laws of the applicable jurisdiction.

* * * * *

(e) "Signed," as used in this section, means an original hand-written signature, except that by public notice in the *Federal Register* the Private Radio Bureau may allow signature by any symbol executed or adopted by the applicant with the intent that such symbol be a signature, including symbols formed by computer-generated electronic impulses.

B. Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90 -- PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 331, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 90.5(b) is revised to read as follows:

§ 90.5 Other applicable rule parts.

* * * * *

(b) Part 1 of this chapter includes rules of practice and procedure for application signature requirements, adjudicatory proceedings including hearing proceedings, and rule making proceedings; procedures for reconsideration and review of the Commission's actions; provisions concerning violation notices and forfeiture proceedings; and the environmental processing requirements that, if applicable, must be complied with prior to initiating construction.

* * * * *

3. Section 90.125 is revised to read as follows:

§ 90.125 Who may sign applications.

See Part 1 of this chapter, Section 1.913, for practices and procedures governing signatures on license applications.

C. Part 94 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 94 -- PRIVATE OPERATIONAL FIXED MICROWAVE SERVICE

1. The authority citation for Part 94 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 94.29 is revised to read as follows:

§ 94.29 Who may sign applications.

See Part 1 of this chapter, Section 1.913, for practices and procedures governing signatures on license applications.

D. Part 95 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 95 -- PERSONAL RADIO SERVICES

1. The authority citation for Part 95 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 95.87 is revised to read as follows:

§ 95.87 Who may sign applications.

See Part 1 of this chapter, Section 1.913, for practices and procedures governing signatures on license applications.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BELL ATLANTIC
TELEPHONE COMPANIES,
Complainant,
v. File No. E-93-13

ATLANTIC
COMMUNICATIONS
ENTERPRISES,
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: April 7, 1993; Released: April 15, 1993

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On November 17, 1992, Bell Atlantic Telephone Companies ("Bell Atlantic") filed with the Commission the above-captioned formal complaint against Atlantic Communications Enterprises ("Atlantic" or the "Defendant"). The complaint alleged that Atlantic had violated Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. § 203 by offering off-tariff interstate common carrier communications services. In accordance with Commission rules governing formal complaint proceedings, the Defendant filed an answer denying the allegations and a motion to dismiss arguing, among other things, that it had not commenced providing interstate communications services. Atlantic also requested sanctions against Bell Atlantic for filing the complaint. On March 3, 1993, Complainant filed a motion to dismiss the complaint conceding that Atlantic is not yet in operation.

2. We will grant Atlantic's and Bell Atlantic's motions to dismiss since it is undisputed that Atlantic is not providing the services complained of in Bell Atlantic's complaint.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the motions to dismiss filed by Atlantic and Bell Atlantic ARE GRANTED for the reasons indicated above.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED and the proceeding IS TERMINATED.

[1] Defendant does not oppose Bell Atlantic's motion to dismiss and Counsel for Defendant has indicated that Defendant does not intend to pursue its request for sanctions.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v. File No. E-89-430

PACIFIC BELL
TELEPHONE COMPANY,
Defendant,

and

In the Matter of

NATIONAL TELEPHONE
SERVICES, INC.,
Complainant,

v. File No. E-91-060

PACIFIC BELL
TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: April 7, 1993; Released: April 15, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989, Telesphere Network, Inc. (Telesphere) and on January 6, 1991, National Telephone Services, Inc. (NTS) filed the above-captioned formal complaints against Pacific Bell Telephone Company (Pacific Bell) seeking damages resulting from Pacific Bell's alleged violations of the Commission's rate of return prescriptions for the periods October 1, 1985 through December 31, 1986 and January 1, 1987 through December 31, 1988. On March 31, 1993, however, Telesphere, NTS, and Pacific Bell filed a joint motion to dismiss the complaints with prejudice stating that the parties have agreed to a settlement which disposes of all issues and controversies in the above-captioned complaints without further reconsideration or appeal.[1]

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[2]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Telesphere's, NTS', and Pacific Bell's Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the Applications for Review filed on March 7, 1991 by Telesphere and NTS ARE DISMISSED.

5. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints
and Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] On March 1 and 3, 1993, the Commission released orders resolving the above-captioned complaints. Memorandum Opinion and Order, FCC 93-61 (released March 1, 1993) and Memorandum Opinion and Order, FCC 93-76 (released March 3, 1993) (collectively "*MO&Os*"). Telesphere, NTS, and Pacific Bell however, have settled all issues between them raised in the complaints, and, accordingly, have no obligations under the *MO&Os*.

[2] Telesphere and NTS filed applications for review of actions holding these above-captioned complaints in abeyance. *See, e.g., Order*, 6 FCC Rcd 653 (Com.Car.Bur. 1991). Because the underlying disputes have been resolved by agreement between the parties, the applications for review are moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 8, 1993

COMMENTS INVITED ON VIRGIN ISLANDS PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for the Virgin Islands (Region 48).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 48 consists of the United States Virgin Islands. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **May 17, 1993** and reply comments on or before **June 1, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 93-105 Virgin Islands-Public Safety Region 48.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 16, 1993

CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

PUBLIC COMMENTS INVITED

Several local exchange carriers filed proposed revisions to their cost allocation manuals (CAMs) for the separation of regulated and nonregulated costs for the quarter ended March 31, 1993. Listed below are the names of the carriers that filed revisions and the file number assigned to each revision.

Ameritech Operating Companies	AAD 93-26
Bell Atlantic	AAD 93-27
BellSouth Corporation	AAD 93-28
Centel Corporation	AAD 93-29
Cincinnati Bell Telephone Company	AAD 93-30
GTE	AAD 93-31
Lincoln Telephone	AAD 93-32
Nevada Bell	AAD 93-33
NYNEX Telephone Companies	AAD 93-34
Pacific Bell	AAD 93-35
Puerto Rico Telephone Company	AAD 93-36
Rochester Telephone	AAD 93-37
Southwestern Bell	AAD 93-39
United Telephone	AAD 93-40
U S West, Inc.	AAD 93-41

In addition, the following companies filed letters stating there were no changes to their CAMs for the quarter ended March 31, 1993.

American Telephone and Telegraph Company	AAD 93-25
Southern New England Telephone Company	AAD 93-38

Parties may file comments on the proposed revisions to the CAMs no later than **May 18, 1993.** Replies should be filed by **June 2, 1993.** Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY	File No. ITC-90-035
IDB COMMUNICATIONS GROUP, INC.	File No. ITC-91-049
TRT/FTC COMMUNICATIONS, INC.	File No. ITC-91-057
MIRALITE COMMUNICATIONS, INC.	File No. ITC-91-153
ASCOM AUTELCA COMMUNICATIONS, LTD.	File No. ITC-91-162
US SPRINT COMMUNICATIONS COMPANY, LIMITED PARTNERSHIP	File No. ITC-91-185
PROFESSIONAL VIDEO TRANSMISSION SERVICES CORPORATION	File No. ITC-91-201
GENERAL COMMUNICATION, INC.	File No. ITC-91-202
WORLD COMMUNICATIONS, INC.	File No. ITC-91-203
THE TEN CORPORATION	File No. ITC-91-204
SOKOL AMERICA, INC.	File No. ITC-91-205

Applications for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Satellite Channels of Communication between the United States and the Republics of the Former Soviet Union and Certain Eastern European Countries via the Intersputnik Satellite System for the Provision of Public Switched Services

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: March 31, 1993 **Released: April 16, 1993**

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish and operate channels of communication between the United States, on the one hand, and the republics formerly comprising the Soviet Union and certain Eastern European countries, on the other hand, via the Intersputnik Satellite System for the provision of public switched services, including international message telephone service (IMTS), facsimile, and data services. The applications were placed on public notice. Comments concerning the appropriate allocation of the one hundred public switched network (PSN) circuits were filed by IDB Communications Group, Inc. (IDB), The TEN Corporation (TEN Corp.), and General Communication, Inc. (GCI).[1] American Telephone and Telegraph Company (AT&T) filed comments opposing those competing applications which were filed after the Commission established a cut-off date for filing applications to use PSN circuits via the Intersputnik system.[2] IDB, AT&T, Professional Video Transmission Services Corporation (Professional Video), and GCI filed reply comments.

I. APPLICATIONS AND BACKGROUND

2. The applicants each request authority to establish and operate voice-grade international satellite circuits using the Intersputnik Statsionar 4 satellite located at 14^0 W.L. to provide public switched services, including IMTS, data, and facsimile services, between appropriately licensed earth stations in the U.S. and the republics formerly comprising the Union of Soviet Socialist Republics and certain Eastern European countries. The number of circuits requested by each applicant is as follows: AT&T--350 64-kbps circuits; IDB--100 64-kbps circuits; Miralite Communications Inc. (Miralite)--90 64-kbps circuits;[3] TRT/FTC Communications--100 64-kbps circuits; Ascom Autelca--100 64-kbps circuits; US Sprint--43 64-kbps circuits; Professional Video--90 64-kbps circuits; GCI--20 64-kbps circuits; WorldCom--20 64-kbps circuits; TEN

[1] World Communication, Inc. (WorldCom) filed informally by letter addressed to Gerald P. Vaughan, Deputy Chief, Common Carrier Bureau.

[2] *See* Public Notice Report No. 6601 (August 5, 1991) which established a cut-off date for filing applications to use 100 64-kbps equivalent circuits via the Intersputnik system. Professional Video, GCI, WorldCom, TEN Corp. and Sokol America, Inc. filed applications after the public notice was issued.

[3] On March 8, 1993, the Commission approved the *pro forma* assignment of Miralite's Section 214 authorizations to Direct Net Telecommunications, Ltd. *See* application File No. I-T-C-93-119-AL.

Corp.–10 64-kbps circuits; and Sokol America, Inc. (Sokol)–90 64-kbps circuits. The cumulative total of 64-kbps equivalent circuits requested is 1,013.

3. The applicants assert that the there is a tremendous, yet unmet, demand for high quality telecommunications services as a result of the developments that have taken place in the Eastern European countries and in the republics of the former Soviet Union over the past few years. For example, AT&T states that 91 out of every 100 calls from the U.S. to the former Soviet Union are never completed and over 2,000 circuits are needed to handle recent traffic growth. US Sprint notes that telecommunications traffic between the U.S. and the former Soviet Union increased over five-fold between 1985 and 1989. The applicants state that existing INTELSAT facilities are inadequate to handle such demand. They believe that a grant of their applications will permit East-West communications to expand, substantially reducing capital investment demands on the former Soviet Republics and the Eastern European telecommunications ministries as well as private industry. The applicants also claim that a grant of Section 214 authority to provide these services will spur competition, encourage the development of diverse services, and increase route diversity, resulting in greater network reliability.

4. In a letter dated December 14, 1990, the Departments of Commerce and State (Executive Branch) notified the Commission that the INTELSAT Assembly of Parties had taken actions which recognized that, as a generic matter, separate systems interconnected to the PSN at or below the specified threshold of 100 64-kbps equivalent circuits would not cause significant economic harm to INTELSAT.[4] In light of INTELSAT's actions, the Executive Branch stated that it would view applications proposing the interconnection of up to 100 64-kbps equivalent circuits as consistent with the international obligations of the United States and in furtherance of U.S. telecommunications and foreign policy interests, provided the U.S. had met its obligations under Article XIV of the INTELSAT Agreement.[5] The Executive Branch also stated that it had no national or foreign policy objection to the use of the Intersputnik system for international public communications consistent with the foregoing parameters.[6]

5. Due to the small number of circuits available for allocation, and the difficulty in establishing a method for allocation of the 100 64-kbps circuits between eleven applicants, no final authority was granted. However, during the pendency of the subject applications, special temporary authority (STA) was granted to IDB and AT&T, the two carriers that were in a position to activate the PSN circuits.[7]

6. Recently, INTELSAT determined that the interconnection of up to 1,250 64-kbps equivalent circuits for each separate system would not cause it significant economic harm.[8] In a letter dated January 8, 1993, the Executive Branch informed the Commission that it had modified the criteria for separate international satellite systems based on its determination that the interconnection of up to 1,250 64-kbps equivalent circuits per satellite would be consistent with U.S. telecommunications and foreign policy interests.[9] The Executive Branch stated that use of up to 1,250 circuits was conditioned on the satisfaction of U.S. obligations under Article XIV(d).[10] In a letter dated March 25, 1993, the State Department informed the Commission that U.S. obligations under the INTELSAT Agreement have been met with regard to the use of an additional 600 64-kbps equivalent circuits via the Intersputnik Statsionar 4 satellite for service between the U.S. and the Russian Federation.[11] The State Department stated that the Commission should make final authorizations contingent on the applicants reporting to the Commission every three months the amount of traffic carried on the network.[12]

II. DISCUSSION

7. In light of the above considerations, we find that a grant of the above-referenced applications, with certain conditions, will serve the public interest. As the applicants state, the quality of telephone service between the U.S. and the Russian Federation is at unacceptable levels, with the demand for PSN service increasing rapidly. It also appears that this situation cannot be met solely through use of INTELSAT facilities and that circuit terminations need to be established using the Intersputnik system.

8. With the consultation of an additional 600 64-kbps PSN circuits via the Intersputnik system, 700 circuits are now available for allocation among the applicants. Although a total of 700 circuits represents a significant increase over the 100 circuits previously allocated, it is still insufficient to satisfy the requests of the applicants in their entirety.[13] Therefore, we will allocate these circuits among the various applicants as follows: (1) each applicant requesting 30 circuits or less will be granted its

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[4] Letter to Alfred C. Sikes, Chairman, Federal Communications Commission, from Thomas J. Murrin, Deputy Secretary of Commerce, and Lawrence S. Eagleburger, Deputy Secretary of State, December 14, 1990.

[5] *Id.*

[6] *Id.*

[7] The STAs required that IDB and AT&T submit monthly reports detailing their activation of Intersputnik circuits and the "no-circuit" conditions following such activations. The Commission also reserved the right to revoke the STAs at any time without a hearing should the Commission determine that such action was required in the public interest.

[8] INTELSAT Record of Decisions of the Eighteenth Assembly of Parties (Sydney, November 3-6, 1992).

[9] Letter from Bradley P. Holmes, U.S. Coordinator for International Communications and Information Policy, Department of State and Gregory L. Chapados, Assistant Secretary for Communications and Information, Department of Commerce to Alfred C. Sikes, Chairman Federal Communications Commission (January 8, 1993).

[10] *Id.*

[11] Letter from Steven W. Lett, Director for Satellite and Cable Policy, Bureau of International Communications and Information Policy, Department of State to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission (March 25, 1993). Since service has been consulted only between the U.S. and the Russian Federation, the requests of the applicants to serve other international locations are deferred.

[12] *Id.*

[13] Although a number of the comments recommended various methods for allocating the limited number of circuits, the recommendations were based on a total of 100 circuits being available.

full complement of circuits;[14] (2) each applicant applying for over 30 circuits will receive 67% of its requested number of circuits. This allocation is based on the number of circuits each applicant requested, the total number of circuits available and the assumption that each applicant requesting in excess of 30 circuits should receive at least 30 circuits.[15]

9. In allocating the number of circuits as described above, we have taken into consideration concerns that certain applicants may not have an immediate need for the circuits allocated to them, resulting in circuits being "tied up" that could otherwise be in operation.[16] To ensure that authorized circuits will be activated as soon as possible, we have developed certain conditions based on the suggestions of the State Department that will apply to each applicant. First, we reserve the right to revoke and/or reassign these circuits should an applicant be unable to utilize the authorized circuits within ninety (90) days of the release date of this order. We also require each applicant to submit quarterly reports detailing the number of Intersputnik circuits in use and the "no-circuit" conditions during the reporting period.

III. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that application File No. ITC-90-035 IS GRANTED IN PART and American Telephone and Telegraph Company, is authorized to establish two hundred and thirty (230) 64-kbps equivalent circuits of communications between its Roaring Creek earth station in the U.S. and the Russian Federation, via the Intersputnik satellite system located at 14^0 W.L. for the provision of public switched services, including IMTS, data and facsimile service.

11. IT IS FURTHER ORDERED that application File No. ITC-91-049 IS GRANTED IN PART and IDB Communications Group, Inc. is authorized to establish sixty-seven (67) 64-kbps equivalent circuits of communication between appropriately licensed earth stations in the U.S. and the Russian Federation, via the Intersputnik satellite system located at 14^0 W.L. for the provision of public switched services, including IMTS, data and facsimile service.

12. IT IS FURTHER ORDERED that application File No. ITC-91-057 IS GRANTED IN PART and TRT/FTC Communications, Inc. is authorized to establish sixty-seven (67) 64-kbps equivalent circuits of communication between appropriately licensed earth stations in the U.S. and the Russian Federation, via the Intersputnik satellite system located at 14^0 W.L. for the provision of public switched services, including IMTS, data and facsimile service.

13. IT IS FURTHER ORDERED that application File No. ITC-91-153 IS GRANTED IN PART and Direct Net Telecommunications, Ltd.[17] is authorized to establish sixty (60) 64-kbps equivalent circuits of communication between appropriately licensed earth stations in the U.S. and the Russian Federation, via the Intersputnik satellite system located at 14^0 W.L. for the provision of public switched services, including IMTS, data and facsimile service.

14. IT IS FURTHER ORDERED that application File No. ITC-91-162 IS GRANTED IN PART and Ascom Autelca Communications, Ltd, is authorized to establish sixty-seven (67) 64-kbps equivalent circuits of communication between appropriately licensed earth stations in the U.S. and the Russian Federation, via the Intersputnik satellite system located at 14^0 W.L. for the provision of public switched services, including IMTS, data and facsimile service.

15. IT IS FURTHER ORDERED that application File No. ITC-91-185 IS GRANTED IN PART and US Sprint Communications Company Limited Partnership is authorized to establish thirty (30) 64-kbps equivalent circuits of communication between appropriately licensed earth stations in the U.S. and the Russian Federation, via the Intersputnik satellite system located at 14^0 W.L. for the provision of public switched services, including IMTS, data and facsimile service.

16. IT IS FURTHER ORDERED that application File No. ITC-91-201 IS GRANTED IN PART and Professional Video Transmission Services Corporation is authorized to establish sixty (60) 64-kbps equivalent circuits of communication between appropriately licensed earth stations in the U.S. and the Russian Federation, via the Intersputnik satellite system located at 14^0 W.L. for the provision of public switched services, including IMTS, data and facsimile service.

17. IT IS FURTHER ORDERED that application File No. ITC-91-202 IS GRANTED IN PART and General Communications, Inc. is authorized to establish twenty (20) 64-kbps equivalent circuits of communication between appropriately licensed earth stations in the U.S. and the Russian Federation, via the Intersputnik satellite system located at 14^0 W.L. for the provision of public switched services, including IMTS, data and facsimile service.

18. IT IS FURTHER ORDERED that application File No. ITC-91-203 IS GRANTED IN PART and World Communications, Inc. is authorized to establish twenty (20) 64-kbps equivalent circuits of communication between appropriately licensed earth stations in the U.S. and the Russian Federation, via the Intersputnik satellite system located at 14^0 W.L. for the provision of public switched services, including IMTS, data and facsimile service.

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[14] Three carriers requested fewer than 30 circuits: GCI (20), WorldCom (20) and TEN Corp. (10). The significance of 30 64-kbps equivalent circuits (also referred to as an E-1 circuit) is that a carrier would have greater ability to further increase the number of virtual circuits using circuit multiplication techniques.

[15] A Comparison of the cumulative total of circuits requested in the applications (1,013) to the total number of circuits available for allocation (700), and taking into account that a total of 50 circuits would be granted to three carriers that requested fewer than 30 circuits, resulted in a ratio of 67%. We then multiplied the total number of circuits requested by each applicant by 67% to derive a prorated number of circuits for each applicant. Using this method results in an allocation of a total of 695 circuits.

[16] We do not address arguments concerning those applicants that properly filed within the cut-off date established for filing such applications.

[17] *See* n.3.

19. IT IS FURTHER ORDERED that application File No. ITC-91-204 IS GRANTED IN PART and The TEN Corporation is authorized to establish ten (10) 64-kbps equivalent circuits of communication between appropriately licensed earth stations in the U.S. and the Russian Federation, via the Intersputnik satellite system located at 14^0 W.L. for the provision of public switched services, including IMTS, data and facsimile service.

20. IT IS FURTHER ORDERED that application File No. ITC-91-205 IS GRANTED IN PART and Sokol America, Inc. is authorized to establish sixty (60) 64-kbps equivalent circuits of communication between appropriately licensed earth stations in the U.S. and the Russian Federation, via the Intersputnik satellite system located at 14^0 W.L. for the provision of public switched services, including IMTS, data and facsimile service.

21. IT IS FURTHER ORDERED that those portions of the applications that request service between the U.S. and international points other than the Russian Federation ARE DEFERRED.

22. IT IS FURTHER ORDERED that the applicants shall provide the international services authorized herein using existing earth stations in the U.S. authorized to communicate with the Intersputnik satellite system or future earth stations which may be so authorized.[18] Should any applicant wish to construct its own earth station facilities to provide these services, an appropriate application under Title III of the Communications Act will be required.

23. IT IS FURTHER ORDERED that each applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

24. IT IS FURTHER ORDERED that each applicant shall file the annual reports of overseas telecommunications traffic, required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

25. IT IS FURTHER ORDERED that each applicant shall file a separate Section 214 application for the use of any additional circuits over separate satellite systems.

26. IT IS FURTHER ORDERED that no material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between each applicant and the foreign correspondents in the Russian Federation. A copy of each of the agreements shall be filed with the Commission within 30 days of its execution.

27. IT IS FURTHER ORDERED that neither the applicants nor any persons or companies directly or indirectly controlling any of them or controlled by any of them, or under direct or indirect common control with any of them, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the U.S., its territories or possessions, which is denied to any other U.S. carrier by reason of any concession, contract, understanding, or working arrangement to which any of the applicants or any persons or companies controlling any of them or controlled by any of them are parties.

28. IT IS FURTHER ORDERED that the Commission reserves the right to revoke and/or reassign the above-authorized circuits should any applicant be unable to utilize the authorized number of circuits within ninety (90) days of the release of this order.

29. IT IS FURTHER ORDERED that the continued effectiveness of this authorization is conditioned on the outcome of future review by the Executive Branch and the Commission. If it is determined that the continued use of the Intersputnik is no longer in the national interest, this authorization will be subject to cancellation.

30. IT IS FURTHER ORDERED that each applicant shall submit quarterly reports detailing the number of PSN circuits in use each month over the Intersputnik satellite system. The report should also detail monthly the "no circuit" conditions during the reporting period. The reports shall also set forth the number of circuits each applicant has in use over each communications system for the countries served by the Intersputnik system. The quarterly reports shall be submitted within 60 days from the end of each calendar quarter.[19]

31. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[18] These authorizations are not to be construed as permitting the provision of any service between earth stations located within the United States.

[19] This reporting requirement is subject to approval by the Office of Management and Budget.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

TRI-STATE TELECOMMUNICATIONS CORPORATION OF TEXAS

TRI-STATE TELECOMMUNICATIONS CORPORATION OF INDIANA

TRI-TEL COMMUNICATIONS OF THE PIEDMONT

TRI-STATE TELECOMMUNICATIONS CORPORATION OF TENNESSEE

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to transfer control of international resale authorizations

File No. I-T-C-93-087-TC

MEMORANDUM, OPINION AND ORDER

Adopted: April 9, 1993; Released: April 16, 1993

By the Chief, International Facilities Division:

1. Tri-State Telecommunications Corp. of Texas,[1] Tri-State Telecommunications Corp. of Indiana, Tri-Tel Communications of the Piedmont, Tri State Telecommunications Corp. of Tennessee[2] (Tri-State Companies),[3] LDDS Communications, Inc. (LDDS) and its wholly owned subsidiary MidAmerican Communications Corp. (MCC) filed the above-captioned application on January 25, 1993, pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules requesting authority to transfer control of the Section 214 authorizations held by the Tri-State Companies to MCC. The application was put on public notice on February 3, 1993. No comments were received.

2. Tri-State Telecommunications Corp. of Texas is a Texas corporation that has authority to provide international message telecommunications service (IMTS) by the resale of the international switched voice services set forth in AT&T Tariff FCC No. 1 and MCI Tariff FCC No. 1 between the U.S. and international points listed in those tariffs.[4] Tri-State Telecommunications Corp. of Indiana is an Indiana corporation that has authority to provide IMTS by the resale of the international switched voice services between the U.S. and international points listed in its authorization.[5] Tri-Tel Communications of the Piedmont is a North Carolina general partnership that has authority to operate as an international resale carrier by reselling the switched voice services set forth in AT&T Tariff FCC No. 1 and MCI Tariff FCC No. 1 between the mainland U.S. and points listed in those tariffs.[6] Tri-State Telecommunications Corp. of Tennessee has authority to operate as an international resale carrier by reselling the switched voice services set forth in AT&T Tariff FCC No. 1, MCI Tariff FCC No. 1, and US Sprint Tariff FCC No. 1 between the U.S. and the points listed in those tariffs.[7] The Tri-State Companies claim to be non-dominant international carriers operating under the regulatory requirements established in *International Competitive Carrier*

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[1] The instant application originally listed this applicant as Tri-Tel Communications of El Paso, a Texas general partnership owned 25 percent by C. James Youngs and 75 percent by Tri-State Telecommunications Corp. of Indiana. On March 30, 1993, the Commission was informed that Tri-Tel Communications of El Paso is instead a partnership of which Tri-State Telecommunications Corp. of Texas is a 75 percent holder and TMC Inc. is a 25 percent holder. According to the letter, Tri-State Telecommunications Corp. of Texas holds the existing Section 214 authorization on behalf of Tri-Tel Communications of El Paso. Therefore, the appropriate applicant for transfer is Tri-State Telecommunications Corp. of Texas. *See*, Letter from Robert G. Berger, Counsel for Tri-Tel Companies, to Linda Trochim, Common Carrier Bureau, dated March 30, 1993 (hereinafter *March 30 Letter*).

[2] The instant application originally listed this applicant as Tri-Tel Communications of the Tri-States, a Tennessee general partnership owned 25 percent by C. James Youngs and 75 percent by Tri-State Telecommunications Corp. of Indiana. The *March 30 Letter* informed the Commission that Tri-Tel Communications of the Tri-States is instead a partnership of which Tri-State Telecommunications Corp. of Tennessee is a 75 percent holder and C. James Youngs is a 25 percent holder. According to the letter, Tri-State Telecommunications Corp. of Tennessee holds the existing Section 214 authorization on behalf of Tri-Tel Communications of the Tri-States. Therefore, the appropriate applicant for transfer is Tri-State Telecommunications Corp. of Tennessee.

[3] Tri-Tel Communications of El Paso, Tri-State Telecommunications Corp. of Indiana, Tri-Tel Communications of the Piedmont, and Tri-Tel Communications of the Tri-States will be referred to as the Original Applicants.

[4] Tri-State Telecommunications Corp. of Texas, File No. I-T-C-87-149, 2 FCC Rcd 6120 (1987).

[5] Tri-State Telecommunications of Indiana, File No. I-T-C-87-073, 2 FCC Rcd 2469 (1987).

[6] TMC of the Piedmont, File No. I-T-C-87-103, 2 FCC Rcd 3331 (1987). According to the *March 30 Letter*, Tri-Tel Communications of the Piedmont received its Section 214 authorization under the name TMC of the Piedmont and subsequently changed its name. The letter states that no other changes occurred.

[7] Tri-State Telecommunications Corp. of Tennessee, File No. I-T-C-88-109, 3 FCC Rcd 4011 (1988).

Policies.[8] They also provide nationwide domestic interstate long-distance telecommunications service through the resale of other carriers' services pursuant to the Commission's domestic competitive carrier policies,[9] and provide intrastate service in several states pursuant to certification, registration or tariff requirements, or on an unregulated basis.

3. MCC, itself an authorized Section 214 carrier, is a Delaware corporation and a wholly owned subsidiary of LDDS.[10] LDDS is a publicly held Tennessee corporation that, by itself and through its existing subsidiaries, provides interexchange telephone service to various locations throughout the United States as a non-dominant carrier pursuant to the Commission's domestic competitive carrier policies, and resells international switched voice services and provides direct service to Iran and private line service to Israel pursuant to the regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[11] Furthermore, its subsidiaries provide intrastate service in 41 states, either pursuant to certification, registration or tariff requirements, or on an unregulated basis.

4. The Original Applicants and LDDS have executed parallel asset purchase agreements pursuant to which LDDS will acquire substantially all the assets of the Original Applicants including their certifications and tariffs. After the transaction, MCC will hold the international Section 214 authorizations along with certain of the other assets. Initially, MCC will provide service to the Original Applicants' customers under the Original Applicants' names pursuant to the Original Applicants' tariffs. Thereafter, MCC will seek appropriate authority to consolidate the operations with its own. The parties argue that their transaction will serve the public interest by permitting MCC and LDDS to realize significant economic and operational efficiencies which will permit the parties to expand their services and continue to provide high quality services at affordable rates.

5. In view of the foregoing, we conclude that the transfer of control of the Section 214 authorizations of the Tri-State Companies to LDDS and then MCC will not adversely affect the public interest. However, the authority granted herein is specifically to allow Tri-State Telecommunications Corp. of Texas, Tri-State Telecommunications Corp. of Indiana, Tri-Tel Communications of the Piedmont and Tri-State Telecommunications Corp. of Tennessee to transfer their Section 214 authorizations to MCC. This authorization is without prejudice to any further action the Commission might take if it appears that transfers of control involving Tri-Tel Communications of El Paso, TMC of the Piedmont or Tri-Tel Communications of the Tri-States have occurred without appropriate prior authorization.

6. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Tri-State Telecommunications Corp. of Texas, Tri-State Telecommunications Corp. of Indiana, Tri-Tel Communications of the Piedmont, Tri-State Telecommunications Corp. of Tennessee, LDDS Communications, Inc. and its wholly owned subsidiary MidAmerican Communications Corp., File No. I-T-C-93-087-TC, IS GRANTED and we consent to the transfer of control of the Section 214 authorizations held by the Tri-State Companies (*see* n.4-7) to LDDS and then MCC.

7. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that MCC must continue to maintain tariffs for the services authorized in this order.

8. IT IS FURTHER ORDERED that MCC must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. IT IS FURTHER ORDERED that MCC is limited, under this order, to the provision of international switched voice services, by the resale of the international switched voice services set forth in the tariffs specified in the authorizations being transferred, between the U.S. and the points listed in those tariffs in accordance with the previous authorizations (*see* n.4-7).

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

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[8] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies)*.

[9] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1980); Second Report and Order, 91 FCC 2d 59 (1982); *recon.*, 93 FCC 2d 54 (1983).

[10] MidAmerican Communications Corp., File No. I-T-C-91-102-TC, 6 FCC Rcd 4176 (1991).

[11] Telamarketing Corporation of Louisiana, File No. I-T-C-90-114-TC, 5 FCC Rcd 7263 (1990); Advantage Companies, Inc., File No. I-T-C-90-008-TC, 5 FCC Rcd 694 (1990); Tele-Fibernet Corporation, File No. 92-177-TC, 7 FCC Rcd 5172 (1992); Prime Long Distance Services, Inc. d/b/a Long Distance for Less, File No. I-T-C-92-040, 7 FCC Rcd 2003 (1992); National Teleservices Company, Inc., File No. I-T-C-91-101, and TRI-J Enterprises, Inc., File No. I-T-C-91-098, 6 FCC Rcd 3605 (1991); American Pioneer Telephone of Texas, Inc., LDDS of Alabama, Inc., LDDS of Arkansas, Inc., LDDS of Indiana, Inc., LDDS of Kansas City, Inc., LDDS of Kentucky, Inc., LDDS-II, Inc., Com-Link 21 Inc., LDDS of Tennessee, Inc., File Nos. I-T-C-90-056-064, 5 FCC Rcd 3230 (1990); AmeriCall Systems of Louisville, File No. I-T-C-90-177, 6 FCC Rcd 241 (1991); First Phone of New England, Inc., File No. I-T-C-89-105, 4 FCC Rcd 5474 (1989); Advanced Telecommunications Corporation, File No. I-T-C-86-099, Mimeo 6047, released July 30, 1986, transferred, File Nos. I-T-C-92-197-AL, I-T-C-92-198-AL, I-T-C-92-203-TC, 7 FCC Rcd 6749 (1992); Directline of Austin, Inc., File No. I-T-C-88-136, Transcall America, Inc., File No. I-T-C-88-135, and Satelco Inc., File No. I-T-C-88-134, 3 FCC Rcd 4348 (1988); Microtel, Inc., File No. I-T-C-86-075, Mimeo No. 4445, released May 13, 1986, transferred, File No. I-T-C-88-123-TC, 3 FCC Rcd 4383 (1988); LDDS Communications, Inc., File No. I-T-C-92-162, 8 FCC Rcd 924 (1993); Dial-Net, Inc., File No. I-T-C-93-059-TC, DA 93-285, released March 16, 1993; Touch 1 Long Distance, Inc., File No. I-T-C-93-081-TC, DA 93-286, released March 16, 1993.

11. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-308

In re Applications of

REAL LIFE EDUCATIONAL FOUNDATION OF BATON ROUGE, INC. — File No. BPED-840322CA

JIMMY SWAGGART MINISTRIES — File No. BPED-840822IF

For Construction Permit for a New Noncommercial Educational Broadcast Station, Channel 203C2, in Baton Rouge, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 1993; Released: April 16, 1993

By the Commission: Commissioner Marshall not participating.

1. In this proceeding, the Review Board selected Jimmy Swaggart Ministries (JSM) as the comparative winner under the standard comparative issue based upon its superior signal coverage proposal. 6 FCC Rcd 2577 (Rev. Bd. 1991). On June 14, 1991, Real Life Educational Foundation of Baton Rouge, Inc. (Real Life) filed an application for review and JSM filed a contingent application for review. Real Life also filed a Motion to Reopen the Record, Designate Issues, and Remand the Proceeding on July 13, 1992.[1]

2. Based upon our review of the record and the pleadings filed by all the parties in this proceeding, we deny Real Life's Motion, affirm the Board's resolution of this case and adopt its decision. Two of Real Life's arguments in its application for review warrant some discussion, however, because they relate to JSM's claim of a non-commercial signal coverage preference and because, although raised by Real Life's exceptions, they were not specifically addressed by the Board.[2]

I. MOTION TO REOPEN THE RECORD AND TO ENLARGE THE ISSUES

3. For the reasons that follow, we find that Real Life's motion is untimely and that it has not met its burden of showing such a substantial likelihood of proving its allegations as to require further hearings despite the untimeliness of the motion. It is therefore denied.

4. Real Life seeks the addition of financial qualifications and 47 C.F.R. § 1.65 reporting issues against JSM. It faults JSM for not reporting judgments against Jimmy Swaggart Ministries, or divisions thereof, totaling over $10,246,000 and the imposition of federal, state and local tax liens amounting to over $1,948,000 that date from October 24, 1991. Real Life contends that the judgments and liens are matters of decisional significance that should have been reported under Section 1.65 inasmuch as JSM is relying on its own assets to establish its financial qualifications. In light of the unreported judgments and tax liens, it seeks an issue to determine whether JSM is financially qualified.

5. In opposition, JSM asserts that there was no need to report the judgments and tax liens under Section 1.65 because JSM has a net worth of $120,000,000 and there was never any reason to believe that the judgments and liens adversely affected its financial qualifications.[3] JSM also asserts that Real Life's motion is procedurally deficient because it was not timely filed nor supported by affidavits of persons having personal knowledge thereof.[4]

6. To warrant relief, a motion seeking new issues filed after the record has been closed must show that it relies on evidence that could not, through the exercise of due diligence, have been discovered earlier, and that the new evidence, if proven, would affect the ultimate disposition of the proceeding as well as that there is a substantial likelihood of proving its allegations.[5] Viewed by these standards, Real Life's motion must be denied.

7. Real Life's motion to reopen the record does not rely on new facts or on newly discovered facts that could not have been reasonably discovered earlier, or demonstrate why it was not possible to file the motion promptly after the judgments and tax liens were imposed. The first tax lien was imposed October 21, 1991 and the first judgment

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[1] In addition, the following pleadings were filed: (1) Mass Media Bureau's Opposition to Application for Review filed June 27, 1991; (2) Opposition to Contingent Application for Review filed July 1, 1991 by Real Life; (3) Opposition to Application for Review filed July 1, 1991 by JSM; (4) Opposition to Motion to Reopen Record filed July 28, 1992 by JSM; (5) Reply filed August 4, 1992 by Real Life; (6) Supplemental Filing in Opposition filed October 28, 1992 by JSM and (7) Responsive Comments filed on November 6, 1992 by Real Life.

[2] For the record, we note that the introductory clause to the second sentence in paragraph 11 of the Board's decision should read as follows: "Real Life does not dispute the underlying engineering data, . . ." 6 FCC Rcd at 2579 ¶ 11.

[3] JSM also disputes the amount of the judgments and tax liens. All but two of those listed in Real Life's motion have been satisfied. The judgment in the case of *Adler v. Jimmy Swaggart Ministries*, listed by Real Life in the amount of $10,000,000 was reduced by the court to $6,640,000, and is suspended pending appeal to the Louisiana State Court of Appeals. The $1,190,978.81 lien held by the Department of Finance for the City of Baton Rouge/Parish of East Baton Rouge represents disputed tax liabilities for the years 1984 through 1988. JSM has made partial payment and indicates that its remaining tax liability is approximately $400,000.

[4] Although Real Life's allegations were not supported by affidavits, the judgments and liens were a matter of public record of which the Commission can take official notice.

[5] *Evergreen Broadcasting Company*, 7 FCC Rcd 6601, 6602 ¶ 8 (1992).

was entered on December 26, 1991. Thus, Real Life filed its motion over six months after the matters could reasonably have been discovered.[6]

8. Having concluded that the motion was not timely filed, we must determine whether it otherwise warrants further proceedings. Upon review of the pleadings before us, we answer this question in the negative. Thus, Real Life's allegations are not sufficient to affect the outcome of this proceeding. In order to establish that the unreported judgments and liens warrant further inquiry, Real Life must show a substantial likelihood of proving that the judgments and liens jeopardize JSM's ability to provide the funds needed for construction of the station and its operation for three months.

9. In its opposition to Real Life's motion, JSM appended an estimated balance sheet purporting to establish its financial qualifications based on a demonstrated net worth of $120 million. Real Life asserted, however, and we agree, that on the basis of the estimated balance sheet, JSM's current liquid assets are substantially less than its current liabilities, and thus, the estimated balance sheet shows that JSM does not have sufficient net liquid assets on hand to construct and operate the proposed station for three months without revenue. Nonetheless, in its opposition, JSM argued that, even if its net liquid assets were considered inadequate, the Commission has held that nonliquid assets several times the value of the cash which such assets are relied upon to yield may be used to provide reasonable assurance of the ability to obtain the required funds. *See International Broadcasting Co.*, 3 FCC 2d 449, 451 (1966); *accord Kaye-Smith Enterprises*, 98 FCC 2d 675, 678 (Rev. Bd. 1984); *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 647 (Rev. Bd. 1983).

10. Because JSM's tendered balance sheet did not contain sufficient detail to determine whether its nonliquid assets were adequate to meet that test, the Office of General Counsel requested additional information relating to the estimated costs of constructing the proposed station and operating it for three months without revenues and a more complete analysis of JSM's nonliquid assets. JSM responded that the total estimated costs for constructing the proposed station and operating for three months without revenues are $200,000, which Real Life does not dispute. The financial breakdown of its nonliquid assets also shows buildings and improvements with a net book value of $56,270,683.81.[7] JSM also lists various real estate holdings ranging from $307,995 to $6,747,000 totalling over $23 million. Real Life asserts that these figures are meaningless because they are not supported by valid appraisals. JSM has provided the purchase price and dates of purchase for each parcel. All of the listed properties were purchased on or subsequent to July 1, 1979.

11. Under these circumstances, the sheer magnitude of the purchase prices of JSM's holdings, which have been supported by affidavit, provide a substantial basis for finding that JSM has reasonable assurance of the funds necessary for construction and initial operation of its proposed FM station[8] and that there was thus no need for JSM to report the imposition of the relatively insignificant judgments and liens noted above.[9] More importantly, based on the entire record before us, it is clear that Real Life has not demonstrated such a substantial likelihood of proving its allegations concerning JSM's financial qualifications as to warrant reopening the record and remanding this case for further proceedings. Thus, Real Life's motion to reopen the record and to enlarge the issues must be denied.

II. APPLICATION FOR REVIEW

12. Real Life argues that there is evidence in the record that casts doubt on the reliability of JSM's coverage proposal. JSM proposes the use of a directional FM antenna. Real Life asserts that the proposed antenna is much more expensive than a normal FM omnidirectional antenna. Real Life then points to the fact that JSM had applied for and received approval to upgrade the facilities of the commercial daytime only AM station, WLUX, owned by JSM in Baton Rouge. Real Life submits that, because JSM never constructed the approved WLUX facilities, JSM will not construct the facilities proposed herein. Based on Real Life's characterization of JSM's past conduct, Real Life concludes that JSM's coverage preference is illusory and cannot justify a dispositive preference in this case.

13. We reject Real Life's argument. Real Life has offered no support for its speculation that the considerations leading to a decision not to construct improvements to an existing AM facility will be the same as those that govern the proposal to construct a new non-commercial educational FM station. We are, therefore, unconvinced that JSM's operation of WLUX provides any basis in this record for a conclusion that JSM is not likely to construct its proposed facilities.

14. Real Life also argues that JSM's coverage proposal should be discounted because JSM plans to duplicate the programming of its commercial daytime only AM station, WLUX. We reject this argument because Real Life has failed to demonstrate that JSM proposes any significant program duplication. We have reviewed the record citations provided by Real Life in support of its argument and find them totally insufficient to sustain such a claim.

15. ACCORDINGLY, IT IS ORDERED, Pursuant to 47 C.F.R. § 1.115 (g), the Application for Review filed June 14, 1991, by Real Life Educational Foundation of Baton

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[6] JSM submits that some of the judgments and tax liens were not only a matter of record but were also widely publicized by the media.

[7] Real Life objects to the financial submission because JSM has not distinguished between general assets and assets that might be essential to support the proposed station. Real Life argues that reliance on any assets that might be necessary for the existence of the station would be inappropriate. JSM reported buildings and property of JSM and JSBC separately, and the buildings and improvements set out above do not include buildings belonging to the Jimmy Swaggart Bible College. Therefore, there is no basis for a finding that use of those assets would be inconsistent with its proposal to operate this new FM station.

[8] This would hold true even if JSM were required to pay the full amount of the disputed outstanding judgment and tax lien.

[9] Real Life submits JSM's failures to bring the judgments and liens to the Commission's attention reflect a pattern of derelictions which warrant Commission consideration. However, in light of our conclusion that there never was a need for JSM to report any of the judgments or liens, Real Life has not shown that there was any pattern of derelictions. Thus, the cases Real Life cites in support of its argument are irrelevant and do not warrant discussion.

Rouge, Inc., IS DENIED; and the Contingent Application for Review filed June 14, 1991 by Jimmy Swaggart Ministries, IS DISMISSED, as moot.

16. IT IS FURTHER ORDERED, That the Motion to Reopen the Record, Designate Issues and Remand the Proceeding filed July 13, 1992 by Real Life Educational Foundation of Baton Rouge, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PIKE FAMILY BROADCASTING, INC. File No. BPH-870330MT

For Construction Permit
for a New FM Station on Channel 258A
in Rancho Mirage, California

MEMORANDUM OPINION AND ORDER

Adopted: April 9, 1993; Released: April 16, 1993

By the Commission:

1. By Memorandum Opinion and Order in *Pike Family Broadcasting, Inc.*, 6 FCC Rcd 5552 (1991),[1] we denied an application for review filed by Pike Family Broadcasting, Inc. ("Pike"). Subsequently, we denied Pike's petition for reconsideration of our denial of review. *Pike Family Broadcasting, Inc.*, 7 FCC Rcd 4250 (1992). Then, on July 28, 1992, Pike filed a "Further Petition for Reconsideration," which the Mass Media Bureau dismissed as repetitious pursuant to 47 C.F.R. § 1.106(k)(3). *Letter from Chief, Audio Services Division to Counsel for Pike*, dated August 7, 1992. Now before the Commission for consideration is an application for review, which Pike filed on August 25, 1992, objecting to that dismissal.

2. IT IS ORDERED, That, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules, the application for review filed on August 25, 1992, by Pike Family Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] *Appeal dismissed sub nom. G. Dale Cowle v. FCC*, No. 91-1518 (D.C. Cir. October 26, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 12

Transmittal Nos. 4941 and 4999

ORDER

Adopted: April 9, 1993; **Released: April 9, 1993**

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 19, 1993, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing makes revisions to Virtual Telecommunications Network Service (VTNS) that include modifying the multi-year service period section of the general regulations, introducing new regulations for customers who exercise the fresh look option provided in the *IXC Order*,[2] and introducing monthly VTNS Plans A and B.[3] The transmittal is scheduled to become effective on April 10, 1993.[4]

2. On March 26, 1993, Covia Partnership and United Airlines, Inc., and MCI Telecommunications Corporation filed petitions to reject, and Aeronautical Radio, Inc., the Competitive Telecommunications Association, and Sprint Communications Company LP filed petitions to reject or, in the alternative, to suspend and investigate, Transmittal No. 4941.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4941 and all associated pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to reject or to suspend and investigate AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 4941, filed by Aeronautical Radio, Inc., the Competitive Telecommunications Association, Covia Partnership and United Airlines, Inc., MCI Telecommunications Corporation, and Sprint Communications Company LP ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

[2] *Id.* at 7 FCC Rcd 2677.

[3] AT&T filed revisions to Transmittal 4941 which clarify the fresh look provisions of the tariff. AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 4999 (filed Apr. 5, 1993).

[4] The Bureau deferred the effective date of Transmittal 4941 to April 10, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 7, 1993

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Association of American Railroads - Request for an exception to the one-check-per application requirement set forth in Section 1.1108(b) of the Commission's Rules. 47 C.F.R. § 1.1108(b). **Granted** (January 21, 1993).

CICI, Inc. - Request for refund of the filing fee for a H-G-P cable application - **Denied** (February 19, 1993).

Fafara Partners - Request for refund of a hearing fee for a new FM station at Reedsport, Oregon - **Granted** (March 16, 1993).

Herrin Broadcasting, Inc. - Request for refund of a hearing fee for a new FM station at Lake Ozark, Missouri - **Denied** (February 26, 1993).

Kinlow, Frederick W. d/b/a F.W.K. Broadcasting - Request for refund of a hearing fee for a new FM radio broadcast station at Whitewater, Wisconsin - **Denied** (January 27, 1993).

Sorenson Broadcasting Corp. - Request for waiver of a filing fee for a station at Red Wing, Minnesota - **Granted** (February 1, 1993).

WinCom Wisconsin LP - Request for refund of hearing fees for a FM station at Kaukauna, Wisconsin - **Granted** (February 19, 1993).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202)632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 21 1993

Thomas J. Keller, Esq.
Verner, Liipfert, Bernhard,
McPherson and Hand
901-15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301

Dear Mr. Keller:

This is in response to your request on behalf of the **Association of American Railroads (AAR)** for an exception to the one-check-per-application requirement set forth in Section 1.1108(b) of the Commission's Rules. 47 C.F.R. § 1.1108(b).

We understand that AAR holds 800 licenses for Advanced Train Control System (ATCS) frequencies in the 900 MHz band. These licenses are due to expire on February 11, 1993. AAR will accordingly file renewal applications at that time.

However, AAR requests that the Commission find an exception to the one-check-per-application requirement so that AAR is not required to submit 800 checks to accompany each of the 800 renewal applications. AAR states that "every check issued by the organization must be handled and/or reviewed and/or approved by at least three persons." AAR further states that the cost for processing and handling the 800 checks is estimated to be $16,000. Apart from requesting permission to submit a single payment instrument, AAR indicates a willingness to accommodate the Commission's processing of the applications in whatever way necessary.

Although the Commission's Rules provide that, "[a]pplicants are required to submit one payment instrument (check, bank draft or money order) . . . with each application . . . " (47 C.F.R. § 1.1108(b), we find that the public interest will be served by permitting the submission of a single payment instrument in this case. Here, 800 renewal applications (which are not required to go on Public Notice) will be filed simultaneously on behalf of a single licensee, AAR, requesting the same Commission action in the same radio service, ATCS, on the same frequency on the same FCC Form 574-R. Moreover, each application can be identified by a separate and distinct call sign, thereby enabling the Commission to track the applications once they are in the fee system. Under these extraordinary circumstances, we find that allowing the submission of a single payment instrument avoids needless paperwork and administrative costs.

In order to accommodate this exception, AAR must do the following:

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 19 1993

James T. Roche, Esquire
IDB Communications Group, Inc.
15245 Shady Grove Rd., Suite 460
Rockville, MD 20850-3222

Dear Mr. Roche:

This is in response to your request, on behalf of CICI, Inc., for refund of the $ 610.00 filing fee that was submitted by CICI with its Section 214 application. The refund is sought because CICI's application was withdrawn.

I regret to inform you that the request for refund cannot be granted. Section 1.1111 of the Commission's Rules governing fee refunds makes no allowance for refund of a fee payment upon the withdrawal of an application. See 47 C.F.R. § 1.1111. Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 16 1993

Margaret L. Tobey, Esquire
Akin, Gump, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Re: Fafara Partners
Reedsport, Oregon
Fee Control Number
9205188170367004

Dear Ms. Tobey:

This is in response to your request for a refund of the hearing fee submitted by Fafara Partners (Fafara) in connection with its application for a new FM station at Reedsport, Oregon.

You state that Fafara is entitled to a refund because it submitted a settlement agreement to the Mass Media Bureau providing that its application would be granted and the competing application would be dismissed. The Bureau approved the settlement agreement, dismissed the competing application and granted Fafara's application without designating the applications for a comparative hearing.

Section 1.1111(b)(1) of the Commission's rule provides for a refund of the hearing whenever a broadcast application is granted without designation for hearing. 47 C.F.R. § 1.1111(b)(1).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 26 1993

Nathaniel F. Emmons, Esq.
Mullin, Rhyne, Emmons and Topel
1000 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036-5383

Dear Mr. Emmons:

This will respond to your request for refund of a hearing fee filed on behalf of **Herrin Broadcasting, Inc. ("HBI")** in connection with its construction permit application for a new FM station at Lake Ozark, Missouri.

You state that prior to the Notice of Appearance deadline, HBI and the competing applicant filed a settlement agreement that if granted would result in the grant of the HBI application.

Section 1.1111(c)(4) of the Commission's rules provides for refund of a hearing fee whenever applications are withdrawn pursuant to a settlement agreement, prior to the Notice of Appearance deadline, and the remaining application is immediately grantable. In the instant case, the settlement agreement is still under review. Therefore, although the settlement agreement was timely filed, the refund request is premature.

Accordingly, at this time, we are unable to consider your request for refund and it must therefore be denied without prejudice.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

JAN 27 1993

OFFICE OF
MANAGING DIRECTOR

Donald E. Martin, Esq.
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036

Dear Mr. Martin:

This is in response to your request for Refund of Hearing Fee submitted on behalf of Frederick W. Kinlow d/b/a F.W.K. Broadcasting (FWK), former applicant for a new FM radio broadcast station at Whitewater, Wisconsin (MM Docket No. 91-201).

The hearing fee in this proceeding was due by July 15, 1991. You state that FWK did not pay its hearing fee until August 12, 1991, which was the Notice of Appearance deadline. You explain that the Managing Director denied FWK's request for waiver of the July 15 deadline by letter dated March 19, 1992. On May 2, 1992, FWK filed an Application for Review of the Managing Director's decision. You further explain that FWK subsequently entered into a settlement agreement with the sole competing applicant, the terms of which contemplated dismissal of FWK's Application for Review and its underlying application. You now contend that "[h]aving ceased to prosecute its application and to appeal the Managing Director's decision denying its request, FWK is entitled to the refund of its hearing fee."

We do not agree. The Commission's rules provide for refund of the hearing fee paid by broadcast applicants under certain limited circumstances only. See 47 C.F.R. § 1.1111(b). Refund will be granted in cases where a settlement agreement, filed by the Notice of Appearance deadline, provides for the dismissal of all but one of the applicants and the surviving application is immediately grantable or if matters specified in the designation order can be deleted. 47 C.F.R. § 1.1111(b)(4). In this case, neither of the two settlement agreements filed were submitted by the Notice of Appearance deadline; the settlement agreement ultimately approved was not filed until October 1, 1992, over a year after the Notice of Appearance deadline in this proceeding. Scott M. Trentadue, 7 FCC Rcd 7666 (Rev. Bd. 1992).

Accordingly, your request for refund of the hearing fee is denied.

Sincerely,

Andrew S. Fishel
Managing Director

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FEB 1 1993

IN REPLY REFER TO:

Ellen S. Mandell, Esq.
c/o Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006

Dear Ms. Mandell:

This will respond to your request for waiver of the filing fee submitted on behalf of Sorenson Broadcasting Corporation ("Sorenson"), licensee of KCUE(AM) in Red Wing, Minnesota, in connection with its Form 302 minor modification application. You state that Sorenson filed its minor change application for the sole purpose of correcting the Commission's records regarding the geographical coordinates of its tower, and that the Commission has already waived the fee for the underlying Form 301 minor modification application.

The Commission may waive filing fees only upon a showing of good cause and a finding that the public interest will be served thereby. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 961 (1987); see also 47 C.F.R. §1.1115. We have determined that the Sorenson has demonstrated good cause for waiver of the filing fees, and that the public interest in the accurate description of the location of an antenna tower outweighs the processing costs that the Commission incurs to correct such errors.

Based on the foregoing, your request for a waiver of the filing fee is granted.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

HBerland:OGC
cc: File, Reading File, Attorney File, Holly Berland, Larry Schaffner, Sheldon Guttmann, Kathy Dole, Managing Director, Chief, Fee Section

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 19 1993

Lawrence N. Cohn, Esq.
Cohn and Marks
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036-1573

Dear Mr. Cohn:

This is in response to your request for a refund of a hearing fee submitted by Cohn and Marks on behalf of its client WinCom Wisconsin Limited Partnership.

I understand that two hearing fees were submitted on behalf of WinCom: the first was submitted on September 10, 1992 but was post-dated September 11, 1992; and the second was signed by Cohn and Marks on September 10, 1992 and bore that date. The latter was submitted out of an abundance of caution because there was concern that the first check might not be accepted. Both checks were cashed. You now seek a refund of the latter payment.

Your request for refund will be granted. Duplicate payment of the hearing fee was made and you are merely requesting a refund of one payment. However, in the future you should note that an applicant who submits a post-dated check does so at its risk because it is the Commission's policy to return post-dated checks along with their accompanying applications.

Accordingly, a check for $ 6,760 made payable to the maker of the original check (Cohn and Marks) will be forwarded to you at the earliest practicable time. If you have any questions, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 92-554

IN REPLY REFER TO

Released: December 18, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. Mel Karmazin, President

Sagittarius Broadcasting Corporation
Licensee of Radio Station WXRK(FM)
New York, New York

Infinity Broadcasting Corporation of
Pennsylvania
Licensee of Radio Station WYSP(FM)
Philadelphia, Pennsylvania

Infinity Broadcasting Corporation of
Washington, D.C.
Licensee of Radio Station WJFK(FM)
Manassas, Virginia

600 Madison Avenue, Fourth Floor
New York, New York 10022

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE to the three above-named licensees (collectively referred to as "Infinity"), pursuant to Section 503(b) of the Communications Act of 1934, as amended.

On October 27, 1992, the Commission issued a Notice of Apparent Liability (NAL) to Greater Los Angeles Radio, Inc., licensee of Radio Station KLSX(FM), Los Angeles, CA, for its broadcast of certain apparently indecent material.[1] By letter dated October 28, 1992, we asked you whether or not the three above-referenced stations had aired the same "Howard Stern Show" material that was the subject of our NAL to KLSX(FM) and, if so, to provide the times of day that the material aired. You replied, by letter dated November 4, 1992, that "if the material [the Commission has] identified in the NAL in fact aired on KLSX(FM) on the dates indicated, it can be assumed that the substance of these shows was also broadcast by WXRK(FM), WYSP(FM) and WJFK(FM) on those dates." You also stated that the material "would have been aired by the three Infinity stations from 6:00 a.m. to approximately 10:00 a.m."[2]

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[1] Letter to Greater Los Angeles Radio, Inc., 7 FCC Rcd 7321 (1992).

[2] On December 8, 1992, Senator Alfonse M. D'Amato filed a letter urging the Commission to reject "calls for punitive actions against Mr. Stern."

Pursuant to 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464, which provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication."

The Commission has defined indecency as language or material that, in context, depicts or describes "in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." Infinity Broadcasting Corporation of Pennsylvania, 2 FCC Rcd 2705 (1987). The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

The subject excerpts from "The Howard Stern Show", transcripts of which are attached, appear to be indecent in that they contain language that describes sexual and excretory activities and organs in patently offensive terms. Moreover, because the material aired at times when there was a reasonable risk that children may have been in the audience (between approximately 6:00 a.m. and 10:00 a.m.), it is legally actionable. Thus, it appears that on October 30 and October 31; November 5, 7, 15, 17, 20, 25, 26 and 27; and December 5 and 6, 1991, Infinity violated 18 U.S.C. § 1464 by airing indecent programming on each of the three above-referenced stations. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Sagittarius Broadcasting Corporation, Infinity Broadcasting Corporation of Pennsylvania, and Infinity Broadcasting Corporation of Washington, D.C., licensees of stations WXRK(FM), WYSP(FM) and WJFK(FM), respectively, are each hereby advised of their separate apparent liability for a forfeiture of Two Hundred Thousand dollars ($200,000) for their apparent willful and repeated violations of 18 U.S.C. § 1464 on the dates set forth above.

In determining the amount of the forfeitures, we have carefully considered the apparent pattern of indecent broadcasting exhibited by Infinity over a substantial period since our initial indecency warning to Infinity in 1987 for Howard Stern material carried by WYSP(FM). Infinity Broadcasting Corporation of Pennsylvania, 2 FCC Rcd 2705 (1987). In this regard, we note that a number of serious complaints involving apparently actionable indecent programming aired by Infinity stations or by stations carrying the Infinity-produced and simulcast "Howard Stern Show" have been received by the Commission over the past several years.[3] The clear notice afforded by the 1987 warning and the substantial similarity of the material cited then and here render this intervening pattern of apparent misconduct particularly troubling. Under these circumstances, we believe it is appropriate to impose a monetary penalty substantially higher than

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[3] See, e.g., Memorandum Opinion & Order (Infinity Forfeiture Order), 7 FCC Rcd 6873 (MMB 1992), petition for recon. pending, in which the staff found that a 1988 broadcast of the Howard Stern Show contained indecent material. Consistent with the provisions of Section 504(c) of the Communications Act, we do not take into account in the action taken today the fact that this forfeiture order remains outstanding; we simply cite it to exemplify the pattern of apparent misconduct warranting the fine we set today.

that suggested by our Policy Statement on Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), on recon., 7 FCC Rcd 5339 (1992), pet. for review pending sub nom., USTA v. FCC, No. 92-1321 (D.C. Cir. filed July 30, 1992). In doing so, however, we have continued to take account of the various relevant factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended, and reflected in the Policy Statement.

As suggested by the above discussion, we are seriously concerned that the pattern of apparent misconduct by these licensees may reflect an ongoing indifference to the requirements of federal law governing indecent broadcasts. We are satisfied, based on the facts now before us, that the action we take in this decision reflects a measured and appropriate regulatory response to the conduct described herein. We emphasize, however, that any new facts discovered in connection with existing complaints or pending enforcement proceedings that adversely bear on Infinity's qualifications, or any future failure on the part of Infinity or its subsidiaries to comply in good faith with the prohibitions on indecent broadcasting outside the safe harbor hours, will result in further appropriate enforcement action, which may include further forfeiture proceedings, short-term renewal or the issuance of an order to show cause to revoke some or all of Infinity's broadcast licenses pursuant to Section 312(a) of the Communications Act, 47 U.S.C. Section 312(a) (1982).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 U.S.C. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on December 18, 1992.

BY DIRECTION OF THE COMMISSION*

Donna R. Searcy
Secretary

Attachment

*Commissioners Quello and Duggan issuing separate statements.

Separate Statement
of
Commissioner James H. Quello

Re: Infinity Broadcasting Corporation et al.

In supporting the imposition of a $600,000 fine against Infinity Broadcasting for its broadcast of indecent material on the "Howard Stern Show," I write separately to make several specific points.

First and foremost, I find the magnitude of this fine amply warranted in view of an apparent pattern of indecent broadcasts on this show, which Infinity produces -- a pattern that extends back to 1987 and that is recounted in the Notice of Apparent Liability.

I need not, in this statement, reiterate the concern of the Congress, the public, the Commission, and this Commissioner over the need to protect children from access to indecent broadcast material. As a former broadcaster, I recognize the responsibility of broadcast licensees to keep this basic tenet of their duties as Commission licensees firmly in mind, and as a grandparent as well as a Commissioner I applaud the vast majority of the industry that does so.

From this perspective some might argue that, notwithstanding the unprecedented amount of the fine we levy today, the Commission has let Infinity off too easily. To be sure, there are other steps we could take at this juncture. We could, for example, say "enough is enough" and set all, or some, of Infinity's licenses for hearing to determine whether Infinity possesses the character to continue to hold them or whether they should be revoked. At this time -- and I underline, at this time -- I am not persuaded to take this step. I am not convinced that "Infinity" as a whole is synonymous with "indecency." At least I hope not, and today's action should help determine whether I am right.

There is also the fact that designating Infinity's licenses for hearing at this time would, as a practical matter, doom the pending assignment of the Cook Inlet radio stations to Infinity. Some will no doubt question why the Commission should appear to punish Infinity for its indecent broadcasts with one hand while rewarding it with three new stations with the other. It must be borne in mind, however, that it is Cook Inlet, not Infinity, that would profit immediately from the stations' sale. Thus, to upset

the sale would simply penalize Cook Inlet for the sins of Infinity. Cook Inlet is minority-owned and has an excellent reputation as a broadcast licensee. Its stations have never carried the Stern show, and apparently will not do so, even after they are acquired by Infinity. In setting penalties for infractions of its rules, the Commission's most basic duty, it seems to me, is to make sure it penalizes the right party. The Cook Inlet stations were, and will remain, innocent bystanders to Infinity's apparent violations of the law. This being the case, there would seem to be little to be gained at this point by scotching a transfer that will prove highly beneficial to Cook Inlet.

Having said this, I recognize the possibility that the action we take today may fail to deter Infinity from future violation of the indecency law. As I have said before, at this juncture I am willing to rely upon the deterrent value of the fine we levy today, plus any other enforcement action we may take in the future respecting material Infinity has already broadcast and which is currently the subject of complaints pending before this Commission.

But this willingness is not, and indeed cannot be, open-ended. Should forfeitures for past indecent broadcasts not stop Infinity from broadcasting actionably indecent material in the future, or if an aggravated pattern of repeated violations evolves, I will not hesitate to vote to institute proceedings looking to whether all or some of Infinity's broadcast licenses should be revoked. Again, as both a Commissioner and a former broadcaster, that is not a responsibility I will take any pleasure in discharging, but it is one that I will not shun.

December 18, 1992

SEPARATE STATEMENT
OF
COMMISSIONER ERVIN S. DUGGAN

In re Notice of Apparent Liability for a Forfeiture to Infinity Broadcasting Corporation of Pennsylvania, Infinity Broadcasting Corporation of Washington, D.C., and Sagittarius Broadcasting Corporation

The Commission's decisions on indecent broadcast material, in my judgment, should generally speak for themselves. Today's action, however, requires some elaboration.

Since 1987, encounters between the FCC and Infinity Broadcasting over indecency have fallen into a familiar pattern--- some would say all too familiar. The Commission has found it necessary to impose repeated enforcement actions--- actions intended in part to deter future violations. Now we find ourselves wondering whether Infinity is willing to listen.

We are guided in this case, as we must be, by two principles: a commitment to careful, case-by-case review of individual indecency complaints, and a desire to impose measured, appropriate discipline when violations occur. A $600,000 fine, although unprecedented, is fully consistent with these principles. The forfeiture is appropriate, in my judgment, given the scope of the complaint. It underscores, moreover, the Commission's determination to ensure that Infinity take seriously the clear command of the United States Code with respect to indecent broadcasting. Furthermore, it gives Infinity a chance to demonstrate that its understanding of the public interest rises above the crassest possible definition of that concept.

In granting that chance, the Commission also consents to grant applications assigning three Cook Inlet stations--- in Atlanta, Chicago and Boston--- to Infinity. My agreement with this course is based on an important consideration: Cook Inlet has had nothing to do with today's enforcement action against Infinity. To the contrary, Cook Inlet is one of the positive stories in radio--- a minority-controlled company that has built a successful group of stations across the country. Senator Helms, who at first objected to allowing the license transfers, has considered the impact on an innocent and deserving party and has withdrawn his objection. I agree with him that our focus should be upon Infinity, not others. And I observe, in passing, that it is possible for the Commission in the future to act again on the former Cook Inlet licenses without injury to innocent parties.

Our action today, although it involves difficult judgments, clearly shows that this Commission is committed to enforcing against broadcast indecency. We do so because Congress has instructed us to enforce the law, because the courts have ratified our enforcement efforts, and because it is appropriate that the Commission be concerned about lawful stewardship of the public's airwaves.

I see no reason to speculate on future sanctions that could befall Infinity if this Commission is confronted with new violations. I will simply suggest that a forfeiture of this unprecedented magnitude probably represents the outer limit of what the Commission is willing to do by way of a mere, although substantial, fine.

# # #

Radio Station KLSX-FM, Los Angeles, CA
Date/Time Broadcast: October 30,31; November 5,7,15,17,20,25,26,27; and, December 5,6, 1991, between approximately 6:00 a.m. and 11:00 a.m.
Material Broadcast: Howard Stern Show

Simulcast by Radio Stations WXRK(FM), New York, New York; WYSP(FM), Philadelphia, Pennsylvania; and WJFK(FM), Manassas, Virginia on the above dates between approximately 6:00 a.m. and 10:00 a.m.

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HS: Howard Stern
RQ: Robin Quivers
GR: Geraldo Rivera
LK: Lenny Kravitz
SG: Stacey Gillena
WO: Woman in studio
MV: Male Voice
FC: Female Caller
FV: Female Voice

==========

October 30, 1991

RQ: Pee Wee Herman is trying to make a deal. He and well He wasn't, but his lawyers were in court down in Sarasota, Florida
HS: If he makes a deal, don't shake his hand.
RQ: And the new deal offered by the prosecution is that if Pee Wee pleads no contest then he would have to pay a $50 fine and do 50 hours of community service.
HS: Good. Then elect him governor of Louisiana. It can't be any worse.
RQ: So that would mean that the state would not try to press the issue and determine guilt and there would be, uh, eventually this would all go away. I suppose.
HS: I see.
RQ: And he would only have to pay $50 and do some community service. They are mulling over this offer at this time. Pee Wee was not required to appear in court because he is working on a movie.
HS: Let me tell you this Pee Wee. If they are going to make him do public service, the service should be he should go to every movie theater in Sarasota and scrub the theater seats where guys drop their load. Because I'm going to tell you something that that's disgusting. Imagine I go to the movie theater and I'm sitting in Pee Wee's mess.
RQ: It's interesting, because the other day the lawyers for Mr. Reubens decided they would try another argument to get him out of the case. They wanted the case dropped on the grounds that nudity is expected at a triple x-rated theater. So that Pee Wee was only doing what was expected. If he was nude at the time.
HS: That's brilliant. That's some defense. because there's a movie on there you're allowed to whip it out and spew that evil gunk all over everybody. Now, I don't know about you but I've heard people actually say that this is not a serious offense. He did not hurt anybody.

* * *

October 31, 1991

HS: First of all I had a trauma as a child, which I don't mind admitting to you.
RQ: Which was?
HS: I was outside one night. I happened upon a house and I looked through the window inside the window, you'll be interested in this was my hispanic neighbor, humping a cancer ridden stripper.
RQ: Oh stop it. You are sick.
GR: Tell me more. right?
HS: Her husband was in the other room.
HS: Help me help me. where is my wife?
HS: No let me tell you something. first of all, my parents first they gave me the genes to make me 6'5'' with no penis to speak of. You're not an outcast. I couldn't even change in the locker room.
GR: I heard that about you
HS: Well it's true. Then they stuck me in a black neighborhood, you'd be crazed too.
GR: I would have wet the bed too.
HS: You're not kidding. it was a traumatic upbringing to say the least. There was a time I even hit on black women.

* * *

HS: The closest I came to making love to a black woman was, I masturbated to a picture of Aunt Jemima.
GR: Oh, come on.
HS: On a pancake box. (Laughter) All right? And that was it. And then I heard Aunt Jemima died in a plane crash.
GR: Were you really one of those two finger guys?
HS Yeah. (Laughter) Yeah, Geraldo, oh boy. No, I did it right on her kerchief. (Laughter)

* * *

HS: You ever see "Truth Or Dare?"
LK: No, I saw some of the clips and she.
HS: Let me tell you something, the you tell me, you're a man of peace, this is a woman doing her makeup, right?
LK: Right.
HS: Kinda heavy.
LK: Mmm.
HS: So she gets drunk one night, and evidently she wakes up in a hotel and her ass is bleeding, all right. So.
LK: Whose ass is bleeding?
HS: The woman in the movie.

LK: Right, right.
HS: So she goes to Madonna, she says, listen, I woke up drunk, my ass is bleeding.
LK: You're serious, this is in the film?
HS: I'm being serious.
LK: Okay. I think.
HS: I think you might want to rent this.
LK: Okay.
HS: And she goes, my ass is bleeding Madonna, I woke up in a hotel, I know I was drunk, I was with a bunch of guys and I wake up and my ass is bleeding. I'm really upset. You know what Madonna does?
LK: What?
HS: She laughs. (Laughter) Has that ever happened to you?
LK: Woke up with my ass bleeding? No. (Laughter)
HS: I'm sick of this show.
RQ: Let me tell you.
HS: I got to get a legitimate career.

* * *

HS: Who's she with Richard Gere?
LK: Richard Gere. No. He wakes up with his ass bleeding sometimes.

* * *

HS: What were you doing? I mean, Lisa is walking around the house, thinking she could trust you and you stand there staring at her underpants and stuff. Shannon, you'd be ashamed of yourself. Did you ever masturbate and think about Lisa? All the years you knew Lenny?
RQ: (Laughs)
LK: When he masturbates, he thinks about me.
HS: He does. That's very sad.

* * *

November 5, 1991

RQ: Meanwhile, Pee Wee Herman has taken the deal.
HS: you see if men are allowed to masturbate in public will there be no stopping them? What will they do next.
RQ: Do you really think this is anything more than a slap on the hand?
HS: I'd like to Karate Pee Wee's penis.
RQ: Laugh
HS: Let me tell you something, I would be pretty upset if this Pee Wee was sitting behind me. X-rated or not Robin. I have been to x-rated movies, particularly as a young man.
RQ: Umm.
HS: in my teens.
RQ: Which you should not have been able to get into anyway.

HS: Right, true, I will not say no to that. But I have been to X-rated movies and if someone were sitting behind me, blurting their love juices all over the back of my seat, I got news for you.

RQ: Let me tell you, let me tell you what this has led to. The other day, I was in a movie theater

HS: Uhm.

RQ: and, at the end of the movie, you know, when the lights come up, this man,

HS: Your buttocks was bleeding.

RQ: Stop it.

HS: I know you told me about this off the air.

RQ: And you laughed. No.

HS: I didn't know you were going public with it.

RQ: This man stood up.

HS: Robin got out of the movie theater there was blood coming out of her buttocks.

RQ: And I saw him buttoning his pants, buttoning his belt and then I said no. no. no. He's not and then zipping his fly. So what was he doing during this movie that his pants were completely undone.

HS: He was staring at Fred Norris' picture, press photograph. (Laughter).

HS: So was he the one who made you bleed? or was that something else?

RQ: I was not bleeding. Will you stop that.

HS: What Robin is talking about is if you go to a movie, I don't care what movie it is,

RQ: This was a regular old movie.

HS: When I go to a movie, I don't need a hail storm coming out of some guy's genitalia. And I see the Pee Wee's offense as being a serious one. Now I know people think I'm joking but I am absolutely not. If my daughters or my wife were in a movie theater and they came back with some pervert throwing a huge hail storm on to their backs.

RQ: Wouldn't you be upset?

HS: I'd sure as hell would. I'd beat the piss out of him.

RQ: If you could find him.

HS: Can't find him.

RQ: Under the new deal that Pee Wee struck, he is going to have to pay a fine of $50 and perform 50 hours of community service.

HS: That's disgraceful. He should have done jail time, hard time. RQ: He'd be free of a conviction on the misdemeanor charge because prosecutors said they would not seek a guilty finding. So no record. So how do you like that MTV audience when they stood up and cheered him and applauded for his masturbation. Shocking.

RQ: He was arrested on July 26 after detectives said they saw him masturbating twice in 10 minutes.

HS: Twice in 10 minutes. I, who am the head of the masturbation club. I, I run a masturbation society. I'm someone who is totally devoted to masturbation. I must tell you to do that twice in ten minutes is unbelievable.

RQ: So Reuben's attorney says that this was an offer they could not refuse. Even though he insists that had it gone to trial, Pee Wee's innocence would have been proven.

HS: Let me tell you something. I was watching that MTV show when these people stood up and started applauding. I was sickened. I said I wish that Pee Wee would come out and coat the whole front row with his love juice and really give it to them right in the face. And, as punishment, Pee Wee should be forced to sit in a tub of sperm.
RQ: Oooh
HS: Oooh that means feels good, or oooh bad.
RQ: No. No.
HS: Oh I see.
HS: and then dunk him.
RQ: His head has to go under?
HS: His head has to go under Robin, and he can't shower for a month. That would be his punishment.
RQ: Oh.
HS: And I guarantee that he'd keep it in his pants for the rest of his life.
RQ: You don't think he's learned a lesson from this.
HS: Everybody feels bad for him because he's a celebrity. Just picture him not being a celebrity. Just some perv who's sitting behind you in a movie theater whipping it out and playing with himself all over the back of your seat. (sounds) Then ask yourself what you'd like done with him. Stop with the Pee Wee's play house.
RQ: It's a sad day - a sad day.
RQ: Yeah cause everybody says, you know, well CBS yanked his show off before there was even a trial.
HS: Oh please.
RQ: All that stuff. You know all the sympathetic people
HS: God bless those hard working police officers in Sarasota who were able to uncover this horrible crime.
RQ: Who had the time?
HS: What's next? Pee Wee goes to church and puts a thumb in his ass? And what are we supposed to accept that as normal behavior?
RQ: What will he do next? Where will it end, one never knows.
HS: Well his name is Reubens, he probably goes to synagogue.
RQ: Yes.
HS: Will he put his thumb in his butt in the synagogue? In front of the head Rabbi? (laughter).
RQ: I think not
HS: Of course not.
RQ: Its' sad, but what can you do?
HS: Disgusting. Disgusting.
RQ: We're in the minority. Everybody else thinks Pee Wee is fine.
HS: Oh a minority. let me tell you something Robin. There are people giving standing ovations for this guy.
RQ: That's right. I'm telling you we're fighting the tides. 1991?
HS: I'm going to send them on a sailing trip together. Tom Geozono? and all the executives at WOR
RQ: Wouldn't it be worth it to charter a boat.
HS: Yeah
RQ: After we find out about some really, like that storm that came up we should have had them on a boat then.

HS: Right
HS: Like Gilligan's island.
RQ: (Laugh)
HS: And I don't wish them harm. It would be great. Tom could go fishing with, ah, I'm thinking like ah. What's the general manager's name over at WOR?
RQ: Oh goodness
HS: Michael Alexander.
RQ: Michael Alexander.
HS: Tom and Michael Alexander going on a fishing trip.
RQ: Could you imagine the conversation?
HS: Oh it would be frightening. Two guys staring at each other.
RQ: (Laugh).
HS: Ah..... and then underneath Fred I'd send them in scuba outfits to drill holes in the boat and it would sink. Tom Geozano forced to drink his own urine.
RQ: Oh.
HS: Oh it would be unbelievable.
RQ: Wouldn't you love it?
HS: Michael Alexander. (gargling noise) hey man don't bogart that urine, my friend. Pass it over to me.
HS: Today in the news ladies and gentlemen, Michael Alexander and Tom Geozano forced to drink their own urine. (gargling noise). After what started out as a pleasant fishing trip, where the two of them had a lengthy conversation, Michael Alexander said (gargling) and, Tom Geozano said back (gargling sounds). Then they, Fred Norris drilled holes in the boat, they were stranded at sea and they drank their own urine. (gargling) On day 10 Geozano announced that he had to do a number 2.
RQ: Oh no.
HS: Michael Alexander announced lunch time and
RQ: Oh geez.
HS: That was the end of the party.
RQ: Good bye.
HS: Good bye ladies and gentlemen. That is our newscast and good night.

* * *

November 7, 1991

HS: First I want to just strip and rape Mark and Brian, I want my two bitches laying there in the cold, naked, and I want them crawling on their knees to me, and I want them coming to their king and master.
RQ: Well, I don't know if you want this rape imagery.
HS: Yeah, I want it.
RQ: Oh.
HS: I'm sorry, you don't have to be tagged with it, I'll take it.
RQ: (Laughs)
HS: I want them bleeding from the buttocks.
RQ: Oh.
HS: I want them to wake up one morning and go, our buttocks' are bleeding. And then.

RQ: You know we woke up in a hotel room.
HS: Hey, my frickin' buttocks is bleeding. Then, then the guy is going, wait a second, what happened last night? Then, then they'll open the rating books, oh my god, we were raped by the ratings. It's gonna be beautiful. Stern's in town, our buttocks is bleeding, I don't get it.
RQ: What happened?
HS: Wait a second, oh, Howard Stern is here, no wonder our buttocks is bleeding. Creeps.

* * *

November 15, 1991

[A parody of "The Honeymooners"]

RALPH: Norton. I just found out that Alice can't accept the fruit of my loins.
NORTON: Hey before you give her the fruit of your loins Ralphy, you gotta take off your fruit of the looms.
RALPH: Very funny, Norton. Very funny. Hardy har har. It's just like you to making jokes when Alice can't get pregnant.
NORTON: Hey this sounds serious Ralphy.
RALPH: You bet.
NORTON: What's the matter no lead in the pencil?. No grease in the gun. No stone in the baloney, Ralphy boy?
RALPH: I'll just have you know Norton that Alice is the one that's infertile.
NORTON: Hey. Alice is the problem. What's the matter Ralphy boy, no water in the canyon. No jing in the jang. No clams in the dam. No jelly in the smelly, Ralphy boy?
RALPH: Norton. Will you shut up, Norton? Don't you realize that if I have no son, no Ralph Junior, it's the end of the Kramden line.

* * *

NORTON: Why don't you try what some couple did in New Jersey?
RALPH: What's that Norton?
NORTON: What do you call. Artificial Interpretation Ralphy. That's where you take some of your love lava, you put it in the turkey baster Ralphy and you smear it on another woman's ovaries like a chinese window washer. Ralphy. Bing a di bang a di. Ya pay $10,000 to the woman and the kid is yours. Ralphy.
RALPH: Really.
NORTON: Yeah, there's Trixie all she's using her birth canal lately for a place to store my spare toilet plunger. I used to use for the sewer Ralphy.
RALPH: I don't know. Norton. I just don't know.
NORTON: Ah come on. Take this tupperware bowl, Ralphy, and a copy of Penthouse.
RALPH: Great.

NORTON: Take it in to the bathroom over there and I'll wait right here. How ya doing in there Ralphy. Ya ok big Ralphy.
RALPH: Oh.... oh....(sounds of delight) Wow. (implication is that he is masturbating)
NORTON: Hey big Ralphy. Check out page 43, Ralphy boy, there's some droopers on that babe.
RALPH: Wow Norton. Oooh, Norton.
NORTON: I'd like to pump 'em up. It's like a rusty ole
RALPH: (Sound of flushing toilet).
RALPH: Here Norton. Put this love lava in a safe place. I gotta rest a while here in the can.
NORTON: All right there Ralphy boy. I'll close the door.
NORTON: While you're recuperating Ralphy. I'm going to ask Trixie if she wouldn't mind renting out her baby gutter.. Maybe I should put this pork chop chowder in the refrigerator for some safe keeping. I'll be back in a minute Ralphy boy.
RALPH: Hey Norton. Norton. Where the hell did he go. Boy, I tell you sex makes me hungry. Wonder what Alice left me for lunch. I'll check into the refrigerator here. Oh boy. Custard. I just love custard. (He's eating it). Mmmmm. This is one of Alice's best recipes. I'll tell you. Oh boy.
NORTON: Hey, Ralphy. Ralphy boy. What ya eating over there Ralphy?
RALPH: Don't bother me Norton there's only enough custard here for one.
NORTON: But Ralphy boy, let me just say this
RALPH: Just this one time, Norton, I'm going to eat this custard by myself.
NORTON: But Ralphy boy, I'm not sure you should be eating that custard. I mean it ain't custard.
RALPH: What are you talking about Norton?
NORTON: I said it's not custard there, Ralphy boy.
RALPH: Well if its not custard, then what is it?
NORTON: Well it's not a what, Ralphy, it's a who.
RALPH: A who, Norton.
NORTON: You're eating up Ralphy Junior.
RALPH: Oh my god. I'm going to be sick. (throw up noises).
NORTON: Hey Ralphy boy. Look at the bright side, you may have lost a son but you gained a pound.

* * *

[Song]

Robin. From the moment I heard you, doing news ... Your breasts fill my thoughts when I'm dreaming... Touch me where there's circumcised juice. Robin. You're so beautiful on the TV show. You've got a booming system. Robin. When you check yourself for breast cancer. Let me, give you assistance. Robin.

* * *

HS: Boy. What I wouldn't do for you if you were my girlfriend. Jesus. man oh man. You'd get the full treatment. You'd get that rocket of love. The hot beef injection.
WO: I'll take it.
HS: Oh you would? All right you are not a bad girl at all. You're a good girl that's what you are. No wonder you're Miss English Leather.
RQ: Any other titles, besides?
HS: Miss Howard Stern.
WO: Oh that's a nice title. I don't mind that one.
RQ: Geez. I could see that sash.
HS: Yeah. That's a big sash.
WO: What else. I'm also coming out in the hot rod magazine, American Rodder.
HS: My god it's crowded in my pants. Man oh man do you shave completely?
WO: Just about. I like those skimpy bikinis, what else are you gonna do.
HS: Really. I'll give you $50 if you let me see.
WO: 50 bucks.
RQ: What? I didn't even hear that. You offered her money.
HS: Excuse me, Robin, I'm negotiating. She heard it. Have you ever won Miss spread eagle?
WO: No
HS: Too bad.
RQ: So, in Miss Rodder, are you in a bikini?
WO: Yes. American Rodder. It's a whole layout.
HS: It's hot rod. $65.
WO: No. But I brought you Howard a gift today.
HS: What's that?
WO: This is my own poster.I came out with my own poster.
HS: No. Let's talk about a different poster.
HS: Do you shave completely?
WO: Yes. Pretty much so.
HS: What do you use a razor or an electric shave?
WO: A daisy.
HS: Yeah. What, every morning in the shower. Like you just.
WO: Yeah. Its' easy.
HS: You do it yourself. You don't get any bumps or anything?
WO: No. I'm dutch and German. I'm light. I have no problem.
HS: Do me a favor. Can you stand up so I can see if you have any bumps. Razor bumps. Any hair on your butt? Turn around. Wow. Look at that, nothing. Boy, you're a real woman. I had a transsexual in here yesterday and I wanted to vomit. Guy had a big flat ass like a man.

* * *

RQ: You'd better be a good boy.
HS: No, I can't be good because it's the weekend. (Unintelligible)
RQ: You're going to lose all of us our jobs.
HS: You think I'd say penis?
RQ: Oh no.
HS: I don't care what the FCC says. Where is the FCC?
RQ: Somebody stop him.

HS: Hey FCC, penis.
RQ: Put your hand over his mouth. (Laughter).
HS: I don't care, it's the weekend, baby.
RQ: It's a stampede in here, you can't say that (stampede sound effect).
HS: Yeah, I don't care. I do draw the line at vagina. Whoa, whoa, I can't believe I just said that word.
RQ: That's it. Here they come.
HS: Uh, ooh, here comes the thought police, I don't believe it baby. Oh my goodness. Oh, look at those horses. They're going to trample over you, Robin.
RQ: Watch out. (Laughter).

* * *

[Magic Johnson Song. Sung by Howard Stern]

Did you have sex with Magic. He's got the HIV. He could have infected you and you'd be diseased. Oh that Magic, when he banged you good. He didn't wear rubbers though he knew that he should. If he'd worn a condom you could probably relax. Protection is important when you're nude on your back. No one was safe with Magic. When he hit the road. A dangerous penis when he dropped his load. Take Magic to cure you of AIDS. Soon you could weigh as much as you did in second grade. It's tragic about Magic and this awful thing why couldn't it have happened to Larry King. Do you believe poor Magic and the sad sad truth. He should have used a Trojan or watched Dr. Ruth. Oh that Magic. He got horny and loonie. He should have gone with Pee Wee to some porno movie, although he would have been arrested pretty quick. Simple masturbation doesn't get you that sick. Can you believe in Magic. Believe that Magic could have used control instead of using women like a hockey goal. I don't know. Oh man. Is Eddie Murphy nervous and, Arsenio? I'm talking magic.

* * *

[Discussion about Michelle Pfeiffer].

HS: Buy me a nice ranch. Be there banging away all day and night.
RQ: Fisher Stevens, I think his name is.
HS: Fisher Stevens. You put me in Fisher Stevens' shoes, boy, and I'll show you one satisfied Michelle Pfeiffer. That girl couldn't walk she'd be so sore. She wouldn't know what hit her. Between the vibrators. I would not even need a vibrator. I'd go right in digging for gold. You are not kidding. I'd do everything to her. What ever you want honey. Just go do another movie. Make another 50 million. If you don't mind I'm gonna take care of the ranch. I'll mess around with my hobbies. I'm going to relax. I'm going to sleep in tonight. You don't worry about a thing darling. Boy her rump would be more black and blue than a Harlem cub scout. I'm not kidding Robin.

* * *

November 17, 1991

HS: And copy my style, and then when I come to town suddenly they have no career and Mark and Brian are going to suffer and pay for what they've done to me.
FC: They're horrible, they're horrible. No way.
HS: Two little pussies with their dildos, that's what's going to happen to them. That's what, they're going to be crawling into a hole. Little freaks. You're finished because you steal from me and you know it. Why don't you 'fess up. How about that kid who called.

* * *

November 20, 1991

HS: Let me tell you something, since we found out that you like sex where the rest of us wipe.
RQ: I don't love it.

* * *

November 25, 1991

HS: Why don't you guys cut your penises off? Now I'll watch that.
RQ: Oh good, this week we're going to be in boot camp and not cut our hair. Okay.
HS: Oh gee.
RQ: (Laughs)
HS: Living on the edge. You two little pussies are going right down the tubes. You think you're TV show was cancelled, wait 'til you get smacked with your radio show going down. Mark and Boring, little pussies, hate you. Steal my material. Oh, we never heard of 'em before. Yeah, two Okies from Musgokee and you never heard of me before. Pretty obvious what's going on in Los Angeles, every day people turning off Mark and Boring and coming over to us.

* * *

HS: I think that's a real act of perversion to, to masturbate in a public place. I, even though it is an X-rated theatre
FV: It was a triple-X rated theatre.
HS: Whatever, I've been to that triple-X rated theatre and I'm going to tell you something, I've been to a lot of triple-X rated theatres.
FV: Now, I've never been to one.
HS: Now let me tell you something.
FV: Aren't there people in there doing that?
HS: Ah, once in awhile you'll sit down and some guy will be doing it, and you say to yourself, you know it's a sexy movie but do I want some guy shooting his love gunk all over me?
FV: (Laughs)

HS: I mean, it's indecent. What I would do is I'd go watch the movie, then when I go home I would masturbate. I'd be too embarrassed to masturbate there in the theatre.
FV: Yeah.
HS: I have a certain civility about me.
FV: I see.
HS: A certain "Je ne sais quoi."
RQ: Let me ask you another question.
FV: I don't know what?
HS: Yeah.
FV: He does. I don't what.
HS: I have a certain, I don't know what.
RQ: But ah.
FV: But you also stop masturbating when your wife comes in the room.
HS: Of course.
RQ: So he doesn't do it in front of anybody.
HS: Right.
FV: You don't do it in front anybody even though.
HS: Well, that's for a very personal reason, I don't want my wife to think I'm some kind of pervert.

* * *

FV: But did you ever think of it. If you said watch me.
HS: Eddie maybe I don't want a personal therapy session on the air. OK
FV: Maybe if you said watch me, you would not have to
RQ: It would cure them?
HS: No. I don't want to be cured. Masturbation is a dirty act. It should be done alone. That's why they call it masturbation.
FV: No. No. No. It just means to do, you know.
HS: I know what it means I'm a master at it. You'd think that if I practice at something that much, I'd better know what it means.
FV: You are the master bader. Yeah.
HS: My point is, for a guy to go to an X-rated theater and masturbate, even though it's an x-rated theater,
RQ: And so what if everyone else is doing it.
HS: To me its an act of perversion.
FV: But what are 6 vice cops doing there in the middle of the afternoon?
RQ: Looking for him.
HS: Regardless of the fact that there were guys there, the cops are doing their job.
FV: And, they waited until the movies were over, that was the thing.
RQ: They were polite.
FV: Why didn't they take them inflagrante?
HS: They needed evidence.
RQ: Inflagrante?
FV: Yes, why didn't they take them inflagrante? Why didn't they do it while they were spewing forth their precious bodily fluids.

HS: Would you like me to spew forth and have you grab me? No.
FV: Why didn't they get a baggie out and take evidence.

* * *

November 26, 1991

[Discussion of Santa fondling two children]

HS: The kids sit on the lap. But, how does the guy make the move in front of all these people.
RQ: Here's what happened. They don't tell me specific incidences. But he was booked after parents of two eight year olds told police that the Spybick (?) fondled the boys' genitals over the week end.

* * *

HS: Ho ho ho. You want some toys my son? Play with Mr. Goose.

* * *

RQ: When you get the kid on your lap and you're in that Santa suit. I suppose with all the fur and everything, your hands can sort of disappear. Ya know. Nobody can actually see what you're up to.
HS: Yes son there's a Santa. And he's got a boner.

* * *

HS: Have you seen Mark's penis yet?
MV: No, have you.
HS: Oh yeah. I paid $1500. I paid $1000 to see it. But I saw it.
MV: What does that make Mark.
HS: For the hungerthon.
MV: What does that make Mark if you gave him $1000 to drop his pants.
HS: He's a whore.
HS: Mark Chernoff is such a big pussy.
RQ: Why are you saying that now?
HS: Because he won't say WNEW sucks either. He does not have eye of the tiger either.

* * *

RQ: This doctor has found a way to lengthen the penis.
WO: No. We had the girthing before
RQ: No. This isn't girthing.
HS: Go ahead because I'm there. I would lengthen my penis in two seconds flat. You know why.
WO: Even if they had to kinda take it apart and put those braces on and twist on it every day.
HS: Nope. Is that what they have to do?

RQ: What he says here is that they have to take now I don't know. They cut two ligaments.
HS: Go ahead.
WO: Ouch
RQ: The doctor says "I discovered that by cutting two ligaments, I could extend the penis."
HS: How long?
RQ: He tried it on a peasant son. This is in China of course.
WO: The peasants, we can practice on them. Where's Dr. Mengele when you need him.
RQ: Yeah, just get me one of those peasant over there.
HS: Yeah, just get me one of those peasants boys, they won't miss their penis.
RQ: The operation was such a success the man married in 1986 and had a child a year later.
HS: So let me get this straight. By cutting the two little ligaments in my penis it will allow it to stretch out.
RQ: That's what this guy says. So they start off the article talking about this guy, Chin, whose in his hospital bed recovering from the operation.
WO: Oh, Chin. I so happy. I so happy. I marry you now
HS: Now my penis is an inch long.
WO: I so happy, you make me a woman.
RQ: They say the doctor comes in, he whips back the sheets, whipped out a ruler and measured Mr. Chin's penis.
HS: Where are you getting this, by the way?
RQ: This is from a Canadian paper. Somebody faxed it in to me.
HS: All right I'll go along with that.
WO: Did they check the ruler. Which ruler did they use before and which ruler did they use after?
HS: You know what's amazing. The doctors in China are really amazing people they make your penis grow but the media really sucks. This is from a paper in Canada. The Chinese paper could not even get this out.
WO: No. No. They could not.
RQ: So when he put the ruler next to Mr. Chin, he yells out 9.5 centimeters.
HS: Eureka.
WO: Now what does centimeters that's like two inches.
RQ: Well what is 9.5 centimeters?
HS: Jackie knows that stuff.
MV: It's 2.54 cm per inch.
WO: So that's about 2 1/2
RQ: So were talking at least 4.
WO: 9. What?
RQ: 9.5.
MV: Yeah all right. Four.
HS: Four inches.
RQ: So, he was four inches, just laying there.
HS: Three and half inches can you handle that Eddie?
MV: Not wide enough.
HS: Not wide enough. That's the problem.
WO: Yes I'm looking for the devil's diesel rig. He has eighteen wheels coming at me.

RQ: Mr. Chin said I wasn't normal. Before the operation, he had been just three centimeters long.
WO: What, that's about a inch?
HS: That's 0 inches in America
RQ: 1.18 inches
WO: Good on the calculations Jackie.
RQ: So he travelled 2,400 Km from his home.
WO: How many miles is that Jackie?
HS: Yeah, come on Jackie
MV: That's 4 1/2 million inches.
RQ: I love reading stories from foreign countries.
HS: Yeah km and cm
WO: Why can't we go metric. All the rest of the world is metric.
HS: Because we're too stupid to figure it out.
WO: Yes we're just too stupid. We go by Quarts and pecks and
HS: I have no problem with that
RQ: I'm happy with it.
HS: Let the rest of the world adjust to us, thank you.
RQ: Now, Mr. Chin says he can go and look for a wife. This was holding him back.
WO: You have to have a certain length before you can (unintelligible).
RQ: Apparently, in China, now the women have become more liberated and they have become more demanding sexually.
WO: Ooh. Don't bind my feet, don't bind my soul.
RQ: So if their husbands cannot satisfy them, they say bye bye. It's not the same way as it used to be.
WO: They're divorcing them?
RQ: Yeah. All these guys are rushing to Dr. Long the guys name is.
HS: Dr. Long? Ok. Let's go. That's not a real story.
RQ: Yeah. It is too.
WO: Someone made it up in a print shop and sent it to you and you bought it.
HS: Alright, what else is in the news, Robin? You just lost all credibility.
HS: Dr. Long. What about Nurse Vagina, is she working there too?

* * *

November 27, 1991

[Talk with Stacey Gillena (SG) from Knots Landing].

HS: Hey I've done stuff to myself and thought about you.
RQ: Oh dear.
SG: Oh my god. What have you done ?
RQ: Do you really have to announce that to a person?
HS: I'm not kidding. One time I was laying in bed, right? You understand that I go to bed early. In order to get to bed early, I have to have some kind of sex and my wife is not always available because she is putting the kids to bed. You understand what I'm saying.

SG: Wait how many kids do you have?.
HS: Two. And what a mess you caused.
SG: Oh no. what?
HS: My whole bed was a messy.
SG: Oh shut up.
RQ: You are just awful.
HS: I'm being serious. So I'm thinking about you. So I meet you and you're just wearing like panties.
SG: You met me in your dream?
HS: Well no dream. I mean. I just conjured you up. If you know what I mean. I pictured you in thong panties. Do you wear those kind? do you wear G-string panties.
SG: Yeah, I do. I have them.
HS: I pictured you in G-string panties. And like no bra on. But just like, you know one of those little cut off t-shirts, Robin, where the top the breasts hang out the bottom a little bit.
SG: Gross what do you think I have, like, saggy breasts?
HS: No, no, no. It's so short, the top, that the bottom half of your breasts stick out.
RQ: You can't help it.
SG: Oh. Got it. Got it
HS: And you started coming on to me and we were making out and then you I did everything to you. But I mean everything.
RQ: This all happened in how many seconds?
HS: It just takes me like a minute or two.
RQ: And all of this was going on.
HS: I could not concentrate on her the whole time. It has to be someone I've been with.
RQ: Oh I see.
SG: Now. What now. I did stuff to you or you did stuff to me?
HS: I did stuff to you the whole time. You were pretty, actually lazy in bed.

* * *

HS: You ever bang a guy during a love interest scene?
SG: You mean really?
HS: Yeah.
SG: No.
RQ: Does it ever lead to any love off-screen though?
HS: Yeah, does a guy ever get aroused? Cause I know if I did a love, there would be no room on the screen for my boner. They would have to throw me right out. Right, Robin?
RQ: That's right.
HS: Robin knows, Robin just had her face. Never mind where her face was.
HS: But. Man you are really cute.
SG: Lets do it Howard. I'm going to talk to the producers ya know. It can be like an abusive kind of thing, where you like come in, you rough me up a little bit.
HS: Ya know what I do. I tie you to my radiator and stretch you.

SG: Cool. I love it.
HS: That would be so cool.

* * *

HS: Nicolet walks like Harry is slamming her too hard. Bowlegged or something this year. You know what I'm talking about, Robin? Have you seen it all?
RQ: I haven't seen it.
HS: I swear to god, you think this guy has got the big.
RQ: Oh dear.
HS: The big hot beef injection, 'cause I'm telling you, you could be the new sex symbol on the show.

* * *

HS: Talk to your producer and see if I can't either bang you or the black chick. Be just a one shot deal. I come on. I'll do that show. I've been approached by every show since we got on in Los Angeles. I would do that show. I'm this disc jockey. And one of you falls in with me. I tie you up to my radiator and stretch you out.

* * *

HS: Look at this guy, he sells the advertising time,
MV: Yeah.
RQ: He's like a one-man band.
HS: He writes all the articles for the magazine, do you have a broom in your ass so you sweep up too? I can just picture him, like, taking pictures with a broom in his ass and like typing.
RQ: Typing and sweeping.
HS: Squeezing his cheeks together. Get the place cleaned up before the Colins(?) come in.

* * *

December 5, 1991

RQ: A state health department panel has revoked the license of a 61 year old Brooklyn doctor who it determined had masturbated behind a patient's back while he was examining her.
HS: Really. So, in other words, you're telling me that if your a doctor you're not allowed to masturbate behind anyone's back while you're examining her.
RQ: Apparently not. I don't know that they had made that clear before.
HS: I know guys who went to medical school, they never once really said that you can't.

* * *

HS: These are guys who studied their whole lives. And who really did not have much social contact. They were busy planning for a medical career. You don't learn all the social amenities. You don't know you're supposed to not masturbate. You could make that argument. These guys never dated a lot and now all of a sudden they've got naked women and stuff in their offices. It's hard not to masturbate.

RQ: Let me just say this, the doctor, Harold Mendelbaum.

HS: Harold Mendelbaum, very proud of yourself Mr. Mendelbaum?

RQ: He says that he was not doing what they have accused him of. He has prostatitis.

HS: Well I've had that, so I know what he's talking about.

RQ: He's suffered from a prostate problem that made him involuntarily secrete urine.

MV: Oooh.

HS: But do you have to do that in front of the patients?

RQ: Yeah couldn't you leave the office? Well the panel found him to be not credible and they found his testimony contrived, inconsistent and false.

HS: You know. Seriously if you were going to put me on the stand, I could come up something better than that. You got to understand something, I ah. Wash my penis, I sterilize my hands, my feet and my penis before I examine my patients. And, if you think that's wrong, ladies and gentlemen, you're out of your mind. Because there's lots of disease on penis. And so I scrub up my penis and if you interpret that as masturbation ladies and gentlemen, then fine, I hope your doctor doesn't wash his penis before he operates on you. Thank you ladies and gentlemen, good night.

RQ: The 29 year-old Manhattan business woman who made these accusations, says that Mendelbaum held a stethoscope to her back with one hand for five minutes, while she took deep breaths.

HS: Hey Jackie didn't Mendelbaum work on your feet.

MV: Son of a gun.

RQ: She had been suffering from a cough. And became unnerved when she noticed that he was breathing heavily and quickly, and then heard his gown rustle. Why was he in a gown.

HS: Why is his gown called Russell? Who names their gown?

RQ: He shuddered, she said, and when she turned her head, she said she saw him picking up his pants.

HS: This is not that unusual. When I was young I had a doctor who took a dump on that white paper.

RQ: Oh stop it.

HS: Oh yeah

RQ: Then the doctor moved to the back of the room wiped himself off with a towel and left the room.

HS: I'm disgusted.

RQ: He's married with three children. Oh dear.

* * *

December 6, 1991

HS: There are people who would do anything to get on TV.
RQ: Yeah, but as a blue dot? (Laughs)
HS: Yeah, but it's a start. You know what I mean. It's show business.
RQ: You know they could sit there and dodge, so that they could.
HS: Yeah, I don't know, I'm just very nervous about TV in general. You know what I mean? People, people's desires to get on. I've seen people light their penises on fire to get on TV.
RQ: That's true.

* * *

HS: I'll tell you about the Hollywood Walk of Fame, if I go to Hollywood again, I'm going to take a dump on Rick Dees' star. (Laughter) Right. Thank you Carol. I'm going to take, does her laugh annoy you?
RQ: It just breaks your concentration.
HS: Yeah, yeah, it's.
FV: I'm sorry, I won't laugh.
HS: No, no. I'm just kidding. You're very beautiful, believe me. Any guy would want to get his hands on you, and that's the important thing. If, no seriously, that's what I will do.
RQ: You're going to take a dump.
HS: Yep, I'll tell you what, if California, if Los Angeles makes me number one, they take our show and give us the number one slot, I will take a dump on Rick Dees' star.
RQ: You will not.
HS: That's what I'm saying. What do you think of that?
RQ: I don't think you're going to do it.
HS: And I'll wipe.
RQ: Like get rid of this tape and forget about it.
HS: I will wipe my ass with Jay Thomas' star. (Laughter) What do you think of that, Robin? I'm making that vow right now.
RQ: I don't want to be there when you do this.
HS: I'm doing it. You are going to be there.
RQ: No way.
HS: I'm going to take a dump on Jay Thomas' star and Rick Dee's star.

* * *

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 92-555

In re Applications of	)	
	)	
COOK INLET RADIO LICENSE PARTNERSHIP, L.P. (ASSIGNOR)	)	File No. BALH-920921HE
	)	
and	)	
	)	
INFINITY BROADCASTING CORPORATION OF ATLANTA (ASSIGNEE)	)	
	)	
For Assignment of the License of Station WZGC(FM), Atlanta, Georgia;	)	
	)	
COOK INLET RADIO LICENSE PARTNERSHIP, L.P. (ASSIGNOR)	)	File No. BALH-920921HH
	)	
and	)	
	)	
INFINITY BROADCASTING CORPORATION OF CHICAGO (ASSIGNEE)	)	
	)	
For Assignment of the License of Station WUSN(FM), Chicago, Illinois;	)	
	)	
COOK INLET RADIO LICENSE PARTNERSHIP, L.P. (ASSIGNOR)	)	File No. BALH-920921HG
	)	
and	)	
	)	
INFINITY BROADCASTING CORPORATION OF BOSTON (ASSIGNEE)	)	
	)	
For Assignment of License and Construction Permit of Station WZLX(FM), Boston, Massachusetts	)	

ORDER

Adopted: December 18, 1992 **Released: December 18, 1992**

By the Commission: **Chairman Sikes dissenting and issuing a statement; Commissioners Quello and Barrett issuing separate statements.**

1. The Commission has before it for consideration (1) the above-captioned applications; and (2) informal objections against the applications

filed by Americans for Responsible Television on October 4, 1992; Senator Jesse Helms on October 13, 1992[1]; American Family Association on October 15, 1992; Family Research Council on October 26, 1992; Focus on the Family on November 10, 1992; Kenneth W. Sherrill on November 16, 1992; and Al Westcott on December 4, 1992.

2. All of the objectors urge the Commission to deny the license assignment applications based on their concerns about the programming that might be aired over the stations. The objectors state that the assignee, Infinity Broadcasting Corporation ("Infinity"), produces and airs over Infinity-owned stations "The Howard Stern Show", which has been cited by the Commission as containing indecent material. The objectors maintain that grants of the applications will give Infinity an opportunity to extend the program to the Atlanta, Boston and Chicago markets and would, therefore, be contrary to the public interest.

3. The objecting parties are, for the most part, not specific as to the material aired by Infinity stations that they believe should disqualify Infinity as an assignee. Family Research Council and Al Westcott, however, do refer to the Commission's forfeiture action against the licensee of KLSX(FM), Los Angeles, California, for the broadcast of indecent material during the Infinity-produced "Howard Stern Show" on 12 separate days during late 1991. We note, in this regard, that the Commission has today issued a Notice of Apparent Liability in the aggregate amount of $600,000 to the licensees of Infinity stations WXRK(FM), New York, New York; WYSP(FM), Philadelphia, Pennsylvania; and WJFK(FM), Manassas, Virginia, for the broadcast of this material. Family Research Council and Al Westcott also point to the Mass Media Bureau's Forfeiture Order issued to these same licensees for airing indecent material during the "Howard Stern Show" in 1988.[2] We believe these pending enforcement proceedings provide the proper forum in which to resolve the allegations of indecent programming by Infinity stations and that these matters need not, therefore, be further considered in connection with the above-captioned assignment applications.

4. Accordingly, upon finding the applicants otherwise qualified, IT IS ORDERED that the applications for consent to the assignments of stations WZGC(FM), Atlanta, Georgia, WUSN(FM), Chicago, Illinois, and WZGX(FM), Boston, Massachusetts, from Cook Inlet Radio License Partnership, L.P. to Infinity Broadcasting Corporation of Atlanta, Infinity Broadcasting Corporation of Chicago, and Infinity Broadcasting Corporation of Boston, respectively, ARE

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[1] On December 14, 1992, Senator Helms filed a letter withdrawing his objection to the subject assignment applications on the basis of a letter dated December 7, 1992, from Infinity to Cook Inlet Region, Inc., in which Infinity states that it "does not intend to broadcast the Howard Stern program on any of the three radio stations [it is] acquiring from Cook Inlet." Senator Helms submitted a copy of Infinity's letter and requested that both it and his withdrawal request be made a part of the record in this proceeding.

[2] Memorandum Opinion and Order, (Infinity Forfeiture Order), 7 FCC Rcd 6873 (MMB 1992), petition for recon. pending.

HEREBY GRANTED.[3] This action is taken without prejudice to the Commission's future enforcement of 18 U.S.C. Section 1464 and the relevant provisions of the Communications Act relating to the broadcast of indecent programming.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[3] We note that, by letter dated December 17, 1992, Cook Inlet Region, Inc., the ultimate controlling general partner of the assignor-licensees and a corporation organized pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. Section 1601 et seq., requested a waiver of Section 211 of the Telecommunications Authorization Act of 1992, Public Law 102-538, to the extent necessary to permit the immediate approval of the captioned applications.

Dissenting Statement of Chairman Alfred C. Sikes

The central question in this proceeding is whether unconditional grant of the assignment applications from Cook Inlet to Infinity Broadcasting serves the public interest. Because I am unable, on the record before us, to answer this question in the affirmative, I respectfully dissent from the majority's decision.

Whether Cook Inlet deserves the benefit of its favorable bargain with Infinity over the sale of three radio stations is not at issue here. From all accounts, Cook Inlet is a solid broadcaster with a strong record of serving minorities and others in its broadcast audiences. It negotiated a deal with Infinity and, under ideal circumstances, should be able to enjoy the fruits of those negotiations.

However, Section 309 of the Communications Act requires the Commission to make an affirmative finding that transfer of a broadcast license would serve the public interest before granting an assignment application. A transfer only serves the public interest if we conclude that the new owner is fit to be a licensee. Although I have not reached a decision on whether Infinity has the requisite character to hold Commission licenses, there are simply too many outstanding questions on this core issue for me to approve the assignment applications without condition.

In contrast to Cook Inlet, Infinity's broadcasting record is far from impeccable. Despite a 1987 warning that material aired during Infinity's "Howard Stern Show" violated the Commission's indecency standards,[1] we have continued to receive and process listeners' complaints about patently offensive language that seems to be the hallmark of that program. A Forfeiture Order issued by the Mass Media Bureau for $6,000[2] will soon be before the Commission on appeal. Today, the full Commission issued another NAL for $600,000 to Infinity -- an unprecedented amount -- for what appears to be 12 more days of indecency violations on three stations.[3] And, to make matters worse, we have received yet another complaint from a listener in Las Vegas that seems to me at least to describe actionably indecent material broadcast during "The Howard Stern Show" on November 9-15 of this year.

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[1] Infinity Broadcasting Corporation of Pennsylvania, 2 FCC Rcd 2705 (1987). This admonition was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit in Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

[2] Memorandum Opinion & Order, 7 FCC Rcd 6873 (MMB 1992), petition for recon. pending.

[3] Letter to Mel Karmazin, adopted December 18, 1992.

The Las Vegas complaint, in my view, is the proverbial straw that breaks the camel's back. On October 27, 1992, we issued a $105,000 NAL to KLSX(FM), Los Angeles, for at least 12 apparent indecency violations occurring during the "Howard Stern Show," which is simulcast on that station.[4] On November 4, 1992, Infinity officially confirmed that its stations in New York, Washington, and Philadelphia carry the "Howard Stern Show" and simulcast the broadcasts at issue in the KLSX(FM) complaint. Yet even though Infinity thus was clearly on notice that we were gravely concerned about the KLSX(FM) material, Mr. Stern apparently paid no heed. On November 24, we received the Las Vegas complaint documenting further apparent indecency violations. These apparent violations occurred two weeks after the KLSX(FM) NAL was issued and one week after Infinity filed its response with us confirming its simulcasting arrangement.

These facts present a critical question: What, if anything, has Infinity been doing in response to our various enforcement proceedings? Perhaps it has taken reasonable measures to bring its stations into compliance with the U.S. Criminal Code[5] and our indecency rules. If so, these measures would bear favorably on the question of whether Infinity is fit to be a licensee. On the other hand, perhaps Infinity management has viewed our indecency fines merely as a cost of doing business and has made little attempt to comply with the law. If so, few things could be more telling about its character to remain a licensee.

Broadcasters are licensed to serve the public interest. When fulfilling this mandate, licensees are not free to repeatedly violate the Criminal Code and our rules even though they may disagree with them. Broadcasters who do so run the very real risk that license revocation proceedings will be initiated against them.

In this case, we are presented with a licensee who, wittingly or unwittingly, has engaged in an apparent pattern of noncompliance with the indecency laws. In the wake of that pattern and without further information about management's response, I simply cannot make the affirmative finding, required by the Act, that Infinity is fit to be a licensee.

Let me reiterate that I have no interest in punishing Cook Inlet for Infinity's apparent transgressions. I therefore had hoped that we would be able to find a way to approve the transfers on at least a conditional basis while also satisfying

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[4] Letter to Greater Los Angeles Radio, Inc., 7 FCC Rcd 7321 (1992). KLSX(FM) is not owned by Infinity.

[5] Section 1464 of the U.S. Criminal Code makes it a crime for anyone to broadcast obscene or indecent language.

ourselves that Infinity possesses the necessary character qualifications. The grant today, however, is unconditional and may preclude the Commission from raising the fitness question in the context of the Las Vegas complaint. Because I cannot support unconditionally the transaction knowing what I know about that complaint, the events preceding it, and following it, I must dissent from the majority's decision.

Separate Statement
of
Commissioner James H. Quello

Re: Infinity Broadcasting Corporation et al.

In supporting the imposition of a $600,000 fine against Infinity Broadcasting for its broadcast of indecent material on the "Howard Stern Show," I write separately to make several specific points.

First and foremost, I find the magnitude of this fine amply warranted in view of an apparent pattern of indecent broadcasts on this show, which Infinity produces -- a pattern that extends back to 1987 and that is recounted in the Notice of Apparent Liability.

I need not, in this statement, reiterate the concern of the Congress, the public, the Commission, and this Commissioner over the need to protect children from access to indecent broadcast material. As a former broadcaster, I recognize the responsibility of broadcast licensees to keep this basic tenet of their duties as Commission licensees firmly in mind, and as a grandparent as well as a Commissioner I applaud the vast majority of the industry that does so.

From this perspective some might argue that, notwithstanding the unprecedented amount of the fine we levy today, the Commission has let Infinity off too easily. To be sure, there are other steps we could take at this juncture. We could, for example, say "enough is enough" and set all, or some, of Infinity's licenses for hearing to determine whether Infinity possesses the character to continue to hold them or whether they should be revoked. At this time -- and I underline, at this time -- I am not persuaded to take this step. I am not convinced that "Infinity" as a whole is synonymous with "indecency." At least I hope not, and today's action should help determine whether I am right.

There is also the fact that designating Infinity's licenses for hearing at this time would, as a practical matter, doom the pending assignment of the Cook Inlet radio stations to Infinity. Some will no doubt question why the Commission should appear to punish Infinity for its indecent broadcasts with one hand while rewarding it with three new stations with the other. It must be borne in mind, however, that it is Cook Inlet, not Infinity, that would profit immediately from the stations' sale. Thus, to upset

the sale would simply penalize Cook Inlet for the sins of Infinity. Cook Inlet is minority-owned and has an excellent reputation as a broadcast licensee. Its stations have never carried the Stern show, and apparently will not do so, even after they are acquired by Infinity. In setting penalties for infractions of its rules, the Commission's most basic duty, it seems to me, is to make sure it penalizes the right party. The Cook Inlet stations were, and will remain, innocent bystanders to Infinity's apparent violations of the law. This being the case, there would seem to be little to be gained at this point by scotching a transfer that will prove highly beneficial to Cook Inlet.

Having said this, I recognize the possibility that the action we take today may fail to deter Infinity from future violation of the indecency law. As I have said before, at this juncture I am willing to rely upon the deterrent value of the fine we levy today, plus any other enforcement action we may take in the future respecting material Infinity has already broadcast and which is currently the subject of complaints pending before this Commission.

But this willingness is not, and indeed cannot be, open-ended. Should forfeitures for past indecent broadcasts not stop Infinity from broadcasting actionably indecent material in the future, or if an aggravated pattern of repeated violations evolves, I will not hesitate to vote to institute proceedings looking to whether all or some of Infinity's broadcast licenses should be revoked. Again, as both a Commissioner and a former broadcaster, that is not a responsibility I will take any pleasure in discharging, but it is one that I will not shun.

December 18, 1992

SEPARATE STATEMENT OF
COMMISSIONER ANDREW C. BARRETT

In Re: Applications of Cook Inlet Radio License Partnership, L.P. and Infinity Broadcasting Corporation

During my tenure at the Commission, I have taken my role of enforcing our policies and rules very seriously. The current Commission has enforced the indecency rules more than any other previous Commission. Our action today in issuing a Notice of Apparent Liability in the amount of $600,000 to Infinity Broadcasting Corporation is unprecedented in the enforcement of indecency, and is the largest single forfeiture amount ever levied by the FCC against a broadcast licensee. A clear message has been sent to Infinity Broadcasting. Future violations of the Commission's rules could lead to even more drastic sanctions. I am hopeful that Infinity will fully comply in the future with the Commission's regulations.

My concern here has been on the impact of the indecency enforcement actions on the proposed transfer of stations from Cook-Inlet Radio Licensee to Infinity Broadcasting Corporation. Cook-Inlet, a partnership controlled and 50% owned by Native Americans, has been one of the more successful broadcast owners. But even more importantly, it has not been found in violation of the Commission's rules. Cook-Inlet's assignment applications have been held while the Commission has examined the qualifications of Infinity based on informal objections to the transfer. Under our statute the Commission must examine applicants for transfer to ensure that they are fully qualified, and that the grant will serve the "public interest."[1] My review of the record in this proceeding indicates that Infinity should be sanctioned for its past actions and warned of possible Commission action based on future conduct. I do not see any need to penalize Infinity, or more importantly Cook-Inlet, by further delaying the transfers.[2]

I support the unconditional grant of these station licenses for two reasons. First, the area of indecency enforcement is one where the Commission must be cautious and not violate the

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[1] See 47 U.S.C. Section 309.

[2] In this connection, I note that Senator Jesse Helms, one of the original informal objectors in this proceeding, has withdrawn his opposition to the transfers. See Letter from Senator Jesse Helms to Chairman Alfred C. Sikes dated December 7, 1992.

legitimate free speech rights of broadcasters. I believe the balance we have struck in our decisions have been correct. My decision in the enforcement proceeding was based on the material broadcast by Infinity on the "Howard Stern Show" which was cited in our enforcement action against KLSX (FM), Los, Angeles, CA.[3] In no way was my determination affected by any of the material which Mr. Stern broadcast concerning the Commission or its individual members.

Second, I support grant of the transfers because it seems clear to me that the transfer is a separate matter and should not be used as an additional means of penalizing the parties for whatever reasons. To have denied this transfer, or to have placed conditions on it, would have been a penalty on Cook-Inlet, an innocent party. Such conditions could only enure to the benefit of the party subject to the Commission's enforcement actions. The Commission has steered the correct course in penalizing the party who broadcast the "indecent" material and granted a transfer which does not contain any conditions on the sale.

Finally, I would note that the primary beneficiaries of our action are the 6500 Alaska Natives of Cook-Inlet. Through their correspondence they have noted the substantial economic harm to them from undue delays, or the failure of the Commission to grant the transfers. Our action today will permit these parties to close on the transfer in an expeditious manner.

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[3] See Letter to Greater Los Angeles Radio, Inc., 7 FCC Rcd 7321 (1992).

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